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ON THE OCCASION OF THE DEDICATION OF "THE INSTITUTE OF RESEARCH AND STUDY IN MEDIEVAL CANON LAW"*

WE are gathered here today united with His Excellency, the Most Reverend Rector Magnificus of the Catholic University, in offering the Divine Sacrifice to implore the assistance of Almighty God for a new undertaking of scholarly research. It is most fitting that we should do so on this Vigil of the Feast of the Holy Ghost for all true dedication of man to learning is an apostolate for light and truth and such apostolate in a particular way needs the guidance of the Paraclete whom Christ calls "the Spirit of Truth".

We rejoice in the foundation of this "Institute of Research and Study in Medieval Canon Law", which has taken form during the last year and is now beginning to function as a center of studies on the documents of Canon Law of the Middle Ages here in the shadow of the great Pontifical University side by side with a well-established School of Canon Law. We all know the function of this School and the splendid service it has given for many decades to the Church and the dioceses of the United States of America by preparing priests for the exacting work in diocesan chanceries and tribunals and in religious communities. These priests continue to distinguish themselves more and more and have earned the gratitude of their superiors and of the clergy and laity at large.

* Address by H. E. the Most Reverend A. G. Cicognani, D.D., Apostolic Delegate, in the Chapel of St. Vincent de Paul, at the Catholic University of America, Washington, D. C., May 19, 1956.

We wish now to recall that, when St. Pius X decided to codify the law of the Church at the beginning of this century, he and his helpers drew on a millenary tradition, a tradition which in its unshakable foundations links the structure of the Church of today to the days on earth of its Divine Founder and likewise mirrors in the history of the sacred canons the history of the Church itself. There is always room, then, for a searching investigation of the antecedents of the Law as we know it today, and in this immense field much more remains to be done by the patient labors of scholars than could be included in the academic curriculum of a university department. An institute established *ex professo* for historical research will prove itself most useful and practical, but it requires well-prepared canonists who will dedicate themselves to the arduous work of recovering and exploring the hidden treasures of the canonical jurisprudence of the past. We rejoice and are sincerely grateful that such an historical institute has been founded and that the Catholic University with its usual broad vision has decided to be its host and that generous benefactors have come forward offering needed assistance. We are happy to see at the head of this Institute our beloved Dr. Stephan Kuttner, whose ability is deservedly recognized wherever Canon Law is taught. In the International Congress of Bologna held in 1952 to commemorate the Eighth Centenary of the *Decretum Gratiani*, he was acclaimed the "great Master of studies on the sources and medieval canonical literature".

The program which this new center of research has set for itself is mainly concerned with Canon Law in the Middle Ages, that is, with the period in which the huge mass of legislation by Popes and Councils, that had accumulated over many centuries, together with royal ordinances, local customs and penitential practices, was shaped into coherent, rational and universal order. Gratianus, a Camaldulese monk, of the twelfth century, was the first to give form in his *Concordia discordantium canonum* to a canonical jurisprudence by which *ratio* and *auctoritas* were to be welded into a body of common law.

Gratian became known as *Magister* par excellence, *Magister Gratianus*, and his book was called the *Decretum*. Through him Canon Law was raised to a science. His book was never promulgated as would be done today with a code of laws, but from its first appearance it was always considered most authoritative both by reason of its content and by reason of the authorities gathered in its pages. Prior to Gratian there was no *Jus Canonicum* in the sense of a collection of universal juridical norms. Confronted with a vast, overgrown, complicated forest of documents, traditions, letters, replies, decisions, decretals, theological and juridical sentences, Gratian cleverly composed a text book, a compact system of law, logically arranged from the documents of a thousand years. Scholars and ecclesiastics immediately understood its importance, sought to provide copies of it (a difficult thing at that time) and undertook commentaries and interpretations. One of the first commentators on the *Decretum* was Rolando Bandinelli, who in 1159 became Pope Alexander III. From Bologna the study of the *Decretum* spread to the Universities of Paris and Oxford and to other universities, and at the same time handwritten copies of it continued to multiply with the result that the *Decretum* advanced in stature and authority.

Hand in hand with the intellectual achievements of the schools went the legislative and judicial activities of the great Popes of the Middle Ages. Several of them had been trained or had taught in the law schools—the above-mentioned Rolando Bandinelli; Lothaire of Segni, Innocent III, one of the most illustrious Popes by reason of his scholarship and of his accomplishments; Ugolino, who in his old age as Pope Gregory IX gave the world his great compilation of the Decretals; Sinibaldo de'Fieschi, who as Pope Innocent IV found time amidst the stormy atmosphere created by Emperor Frederick II to write a learned commentary on these Decretals; Boniface VIII, the learned, ardent and unhappy defender of the liberty of the Church at the threshold of the fourteenth century. These Pontiffs decided cases, instructed bishops, strove for an ever more forceful ecclesiastical dis-

cipline. Schools, tribunals and even rulers of peoples looked to the *Decretum Gratiani* for juridical source material. As legal replies of Sovereign Pontiffs multiplied the authority of the *Decretum* increased, for many of these replies were founded on principles enunciated in its pages. Gradually, between the twelfth and fourteenth centuries the *Corpus Juris Canonici* developed to become the basis of all Canon Law and eventually the basis of our *Codex Juris Canonici.*

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This was truly an age of giants. It was the age which rediscovered the powers of analysis and synthesis in the human mind and gave posterity the scholastic systems of philosophy and theology, culminating in the immortal work of St. Thomas Aquinas. It was the age of the great Irnerius who revived the civil law of ancient Rome in a new jurisprudence; that age developed the great *studia* or universities, eminent saints like Francis of Assisi, Dominic of Guzman, Albert, Bonaventure, the famous cathedrals of christendom. The law of the Church played a leading role. It had absorbed the best of Roman legal thought and ennobled it with the doctrine of the Gospel and the principles of moral theology. Through the untiring work of generations of commentators, the steady progress of papal legislation, the firm practice of juridical procedures, it provided the only efficient universal system of equitable jurisprudence and a supernatural rule of law in a world full of ruthless ambitions and conflicts. It became the chief agent of legal learning, providing a model even for secular administrations and courts of justice. The Church and civil society in the Middle Ages often met through the medium of canonical legislation, and the preeminence of the spiritual over the temporal was publicly expressed and accepted. Regalism, however, had invaded the Church in a devastating manner and it was necessary and urgent to determine in regard to certain matters the specific power of pontiffs, kings and emperors. Gregory VII had freed the Church from the chains of the investitures and had restored to it liberty

and purity. It was an acknowledged principle of *Christianitas* that Peter, in virtue of the moral order, united in himself both the spiritual and temporal orders and possessed *"plenitudo potestatis super gentes et regna"*. The cunning reactions of the Emperor Barbarossa and his grandson, Frederick II, are well known. It was beyond any question that the Pope enjoyed *"plenitudo" "in divinis"* and could judge every act *"ratione peccati"*. On the basis of this concept treatises *De Ecclesia* began to appear. Then, too, came the Bull of Boniface VIII, *"Unam Sanctam"* (Extrav. Comm. I, 8, 1). Classical, indeed, and typical of the time was its composition. To support the Bull's solemn conclusion there are premises beginning with *"considerando"* or "whereas" that offer from Sacred Scripture and theology its demonstrative proofs of the unity that is proper to the Church. Disputes continued on the meaning of Boniface VIII resulting in the common acceptation of the indirect *"potestas"* of the Church or "intervention" *"ratione peccati"*. This well known decretal is cited simply as an example. How useful and necessary it is for the proper understanding of documents not only to transport them to their own times but also to reconstruct them in their original form. Friedberg received high and deserved praise for his edition of the *Corpus Juris Canonici* although his edition is based on only eight manuscripts, all found in Germany, whereas there are about 600 manuscripts of the *Decretum* of Gratian alone in different libraries along with a multiplicity of variants. As there was no printing press, patient amanuenses copied and multiplied the original text. There was no copyright; marginal and interlinear notes, *glossae* and *paleae* were added to it; *summae* and *apparatus* were composed; teachers and decretists vied with one another to give an exact interpretation; questions arose and schools were formed and these schools sought authority in defense of their commentary using *dicta* from the Holy Scriptures, the Fathers of the Church, Councils, fragments of Roman Law and excerpts from the Decretals.

There is still much to be learned and much to be discovered. It is for this reason that Dr. Kuttner in 1948 pointed out the necessity of a new and truly critical edition of the *Corpus Iuris Canonici* through research study on the various manuscripts by classifying and evaluating them from a literary-juridical point of view. It is evident that inestimable advantages would come for the study of law and history, civil and ecclesiastical.

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Already there is one conclusion which we must make with a feeling of joy and pride. Those medieval documents breathe the atmosphere of the Gospels, reflect the same virtues, the same justice. They manifest very clearly that in every age the Church has stood as an impregnable tower constantly promoting the good of souls, dedicated to fostering happiness among people under a variety of circumstances and among men of diverse creeds and ambitions. Truly is the Church in the service of justice as it was preached by Christ. As the Church was established "not to be served but to serve", likewise Medieval Canon Law was made not to dominate but to serve and to guide Christian society. The study of this law and its original sources opens the way to wonderful riches of jurisprudential thought. Once the numerous unprinted works of the medieval canonists become available in modern editions through the efforts of this Institute, our advance toward a fuller knowledge of the great heritage on which our society is built will be apparent. The Holy Father has followed the development of these research plans from their first beginnings with a warm interest and oftentimes has stressed his belief in the valuable services which this undertaking can render. With paternal heart His Holiness has bestowed the Apostolic Blessing upon the Institute's President, his associates and the friends of this magnificent work, and has formulated the prayerful wish that their efforts may be crowned with success. You, students, are the major hope of this Institute. May thoughtful men, as a fruit of this enterprise, ever better understand the beneficial action of the law of the Church in the whole of our civilization.

THE JUDICIAL POWER OF THE CHURCH *

Your Excellency, Most Reverend Archbishop, Right Reverend Prothonotary Apostolic, Right Reverend and Very Reverend and Reverend Members of the Chanceries and Courts of the Province:

IT is an exceptional honor and privilege to address so distinguished a group of jurists. This meeting is most probably the first, or certainly one of the first of its kind held in the United States. The motive underlying the convocation is obviously supernatural, for the greater glory of God, the salvation of immortal souls and the exaltation of Holy Mother Church.

As the program indicates, the purpose of this address is to stress the dignity of the judicial power of the Church and to promote the actual work of the tribunals.

There can be no doubt that the exercise of the judicial power of the Church is of the greatest dignity and importance. No one can doubt, without skirting heresy, that the judicial power itself is of Divine origin. Hence, all participating in the scope of the tribunal are laboring for a supernatural end and with the commission of divinely instituted power. As anyone may learn from the Church's teaching on judicial work, the power of the Church is three-fold, namely, legislative, judicial and coactive. This three-fold power of the Pope, the Bishops and others commissioned by higher authority to exercise it is an element of the Church based on dogmatic

* Address delivered by the late lamented Right Reverend H. Louis Motry, S.T.D., J.C.D., Dean of the School of Canon Law at The Catholic University of America on the occasion of the inaugural meeting of the Conference of Chancery and Tribunal Officials of the Province of New Orleans, Louisiana, in 1951. The manuscript was forwarded to *The Jurist* by the gracious kindness of the Right Reverend Charles J. Plauché, J.C.L., Chancellor, Archdiocese of New Orleans. It is here published to signalize the beginnings of these convocations in the Province of New Orleans and in loving and pious memory of Monsignor Motry.—Editor's Note.

teaching and finds its sources in Sacred Scripture and in Tradition. The purpose for which we are gathered together today and tomorrow is to make ourselves more conscious of the high office to which we are called, namely, to the participation in a divinely founded power of a world-wide organization, the like of which defies adequate grasping. What a tribunal decides echoes through time and into eternity. You will probably all have reflected on the deeper meaning of Church legislation, namely, that the Code of the Church is an actual practical interpretation of divine revelation, and an application of such revelation to facts, events and conditions that occur in the carrying out of the will of divine providence.

"The Fourth Book of the Code presents a system of procedural laws in which the Church seems to realize that its sense of justice is placed before the bar of human and Divine judgment. So many comparisons may be made between the administration of justice in ecclesiastical and civil courts that space will not allow reference to more than a few. One cannot help admiring the desire of the Church to protect the basic rights of every defendant. The most ample opportunity is granted to the accused to insist on respect for his rights. The objection that Church courts are not held in a public manner, in such a way, namely, that the public as such is free to attend, reveals a complete misunderstanding of the administration of justice according to the Church's mind. To preserve the element of justice, allegedly assured by the attendance of the public in civil procedure, the Church lays down strict laws concerning the recording of the acts of the case, which material is open to inspection by both parties concerned and their respective advocates and procurators. The publicity attending many cases in civil law does untold harm to the good name and the justifiable feelings of the parties whose faults are laid bare at public examination. The Church's purpose in procedure is to obtain the truth, the objective reality of the case, and hence its examination of parties and witnesses positively excludes the wily devices too often

found in the records of cross-examination in civil procedure. Again, in preliminary examinations in criminal causes, the utmost care is prescribed that nothing be said or done to harm the name of the prospective defendant. Apparently an effort is being made to introduce in civil procedure also the much maligned process of inquisition, so as to avoid all the injustice and embarrassment consequent upon an indictment that lacks the preliminary investigation required by the dictates of natural law.

In the processes of beatification and canonization one is again led to esteem the prudence and wisdom of the Church in the acts by which it administers its prerogative of infallibility.

Diocesan tribunals exercise in a subordinate manner the high powers of the judicial assignments, confided to the Church by divine will." [1]

This meeting, therefore, stresses our respect and profound reverence for the supernatural activities confided to our care. We, then, as judges and court members will have to render an account to the Supreme Judge on how we have fulfilled our duty as judges and also as ministers of the tribunal power assigned to us.

The importance of the judicial power of the Church may be gleaned from authentic statements made in the course of centuries by the Roman Pontiffs and by many Bishops. Gregory IX in the year 1234 stresses the importance of tribunals. " Volentes igitur, ut hac tantum compilatione universi utantur in *iudiciis* et scholis, districtius prohibemus, ne quis praesumat aliam facere absque auctoritate Sedis Apostolicae speciali." Boniface VIII (1298) promulgated Decretals as follows: " Universitati vestrae igitur per Apostolica dicta mandamus, quatenus Librum huismodi, cum multa maturitate digestum, quem sub Bulla Nostra vobis transmittimus, prompto suscipientes affectu, eo utamini de cetero *in iudiciis* et in scholis." Ioannes XXII in the year 1317 likewise stressed the impor-

[1] *The Jurist*, Vol. I, No. 1, page 63.

tance of Church Law in practically the same terminology: in *iudiciis* et in scholis.

Not to be overlooked are the requests made by Bishops in various countries petitioning the codification of laws which affected the Code of Canon Law. These requests stressed the great importance of tribunals. Most probably the Bishops had in mind the titles of the various decretal books in the *Corpus Iuris Canonici: Iudex, Iudicium,* Clerus, Connubia, Crimen. Primi de sacris canonibus in unum apte redigendis postularunt *Neapolitanae* dicionis Episcopi: "Novum iuris canonici Corpus conficere necesse esse videtur; ac vel in primis *quoad processum causarum:* qui magis ac magis expeditior sit." [2]

The Bishops of France worded their petition as follows: Obruimur Legibus. Hinc fit ut studium iuris canonici infinitis prope et inextricabilibus difficultatibus implicetur, controversiis *ac processibus latissimus* locus pateat; et conscientiae mille anxietatibus angantur et in contemptum legis impellantur.[3]

Thirty-three Bishops in various parts of the world signed a request: "Ut ecclesiasticae leges in mores, in vitam, in instituta christianorum populorum suam cumulate exserant efficacitatem, nihil profecto accommodatius est nihilque opportunius, quam si sapienti ordine digestae in unum codicem colligantur, ad cuius normam sacrum ius et dicatur *in foro* et tradatur in scholis . . . . Quare plures Romanorum Pontificum Constitutiones Decretaque Conciliorum in Corpus iuris canonici nondum illata sunt, quae tamen dispersa non evagari diutius, *cum iudiciorum, tum scientiae iuris* magnopere interest." [4]

Of no small value are the words of the present Pontiff in promulgating the Oriental Law *De Iudiciis.* In the opening paragraph he states [5] that immediately after the promulgation

[2] Cf. *Codex Iuris Canonici,* Praefatio.

[3] Cf. *op. cit.,* Praefatio.

[4] Cf. *op. cit.,* Praefatio.

[5] *AAS,* XLII (1950), n. 1.

of the marriage laws of the Oriental Church most urgent requests were sent to him by the legates and Bishops in the Oriental Church to promulgate as soon as possible the law governing ecclesiastical tribunals. "Sollicitudinem Nostram in bonum et profectum Ecclesiae Orientalis convertentes, de matrimonii disciplina apud christifideles eiusdem Ecclesiae servanda die XXII mensis Februarii anno MDCCCCXXXXIX Apostolicas Litteras promulgavimus, quarum exitus eventusque conceptae spei Nostrae haud impares esse gaudemus. Solatio enim haud mediocri Nobis fuit a Legatis Nostris in regionibus Orientalis Ecclesiae et a sacrorum Antistitibus, qui ibidem sunt, gratiarum actiones excipere itemque significationes, quae aperte obtestabantur inceptum Nostrum communi opinione perutile aestimari. Atqui ab iisdem, dum iteratis votis petebatur, ut quam primum integer legum Codex pro Orientali Ecclesia publicaretur, asseverabatur quoque rem prorsus urgere, *ut saltem canones ad ecclesiastica tribunalia spectantes actutum promulgarentur:* quodsi enim huiusmodi necessitati obviam non iretur, magnum incommodum et detrimentum christifidelium animis exoriturum esse."

The nature and importance of tribunals are best summed up in passages taken from the allocutions of Pius XII to the members of the Sacred Roman Rota.[6] "The Church is the product of a positive act of God, and is therefore on a plane above the social nature of man, though in perfect accord with it; and hence the authority of the Church—and consequently also her corresponding judicial power—are born of the will and act by which Christ founded His Church. It remains true, however, that, once the Church was established as a perfect society by the act of the Redeemer there sprang from her very nature not a few elements of resemblance to the structure of civil society."

"However, this fundamental difference between the two is particularly manifest in one point. The establishment of the

[6] Pius XII, Allocution, 2 Oct., 1945, *Judicial Jurisdiction of the Church: Its Origin and Nature—AAS,* 37-256.

Church as a society was effected, not from below, as in the case of the origin of the State, but on the contrary from above; that is to say, Christ, who in His Church established on earth the Kingdom of God which He announced and destined for all men and for all times, did not entrust to the community of the faithful the mission of Master, Priest, and Pastor which He had received from His Father for the salvation of the human race, but He transmitted and communicated it to a college of Apostles or messengers chosen by Himself, so that they, by their preaching, by their priestly ministry, and by the social power of their office, should bring the multitude of the faithful into the Church, in order to sanctify them, enlighten them, and bring them to the full maturity of the followers of Christ."

"The sacred character which belongs to ecclesiastical jurisdiction by reason of its divine origin and of the fact that it is part of the hierarchical power of the Church, must inspire you, beloved sons, with a high esteem of your office, and spur you on to fulfill its austere duties with a lively faith, unswerving rectitude and ever vigilant zeal. But, behind the veil of this austerity, what splendor reveals itself to one who sees in the judicial power the majesty of justice, which in all its action tends to make the Church, the Spouse of Christ, appear 'holy and without blemish' (Eph. 5, 27) before her divine Spouse and before mankind."

[7] "In virtue of their office and by the will of God, the Bishops, of whom the Apostle says that they are 'placed by the Holy Ghost to rule the Church of God,' are judges in the Church. 'To rule' includes 'to judge' as a necessary function. Hence according to the Apostle the Holy Spirit calls Bishops to the office of judge no less than to the government of the Church. The sacred character of that office, therefore, comes from the Holy Spirit. The faithful of God's Church, whom He has 'purchased with His own blood,' are those upon

[7] Pius XII, 29 Oct., 1947, *Judicial Power of the Church Compared With That of the State in Regard to the Ends of the Two Societies*—*AAS*, 39-493.

whom the judicial activity is exercised. The law according to which judgments are pronounced in the Church is fundamentally the law of Christ. It is the divine vital principle in the Church which moves every one and everything in her —hence also the judicial power and the judge—toward her end: *to secure the heavenly and eternal values.*"

Now I want to come to the third and concluding part of my address. The importance of diocesan tribunals and also interdiocesan tribunals where such exist and, of course, of metropolitan and higher tribunals is equalled only by the difficulty of preparing for and applying the judicial knowledge requisite for the proper administration of justice. I suppose all of you are aware of the fact that the Fourth Book of the Code on Processes is the most difficult of all the Books of the Code. It has been justly called the unknown territory "*terra incognita.*" I am quoting, but not with full approval, the following passage from the introduction to the work *Canon Law* by Bouscaren and Ellis. "We hope that few will condemn us for the almost complete omission of Book IV, *De Processibus.* Procedure is a professional subject calling for mature judgment and an accurate knowledge of a multiplicity of rules. We believe it should not be, and we know that commonly it is not, attempted in a seminary course."

A former President, William Howard Taft, who became Chief Justice of the Supreme Court of the United States is credited with having said, "I have read the procedural laws of many nations, but I have found none that can equal the procedural law of the Catholic Church." I regret I cannot give you the occasion on which he made that statement, but I do know that it is authentic.

The intellectual equipment and the experience of tribunal members concerned should be undoubtedly of a high standard as is evident from the Code itself and from the repeated directions of the Holy See to the Bishops to see to it that the members of the tribunals meet the requirements of their sacred

office. Not to be put aside lightly is also the fact that more supplementary legislation has been issued concerning the Fourth Book than for any other Book of the Code. Also to be considered is the fact that because of the lack of qualified members the Holy See has granted important modifications in the matter of constitution of tribunals. Pius XI on December 8, 1938 made wise and helpful provisions for the establishment of ecclesiastical tribunals in Italy.[8] Important provisions were also made for the reduction of the tribunals in the Philippine Islands by the decree of the Sacred Congregation of the Sacraments 20 Dec. 1940.[9] Canada likewise received a decree for the organization of ecclesiastical tribunals from the same Sacred Congregation of the Sacraments, May 13, 1946.[10]

Within less than ten years after the promulgation of the Code, the Plenary Council of Ireland held at Maynooth provided: [11] "In unaquaque dioecesi constituatur tribunal ordinarium primae instantiae, quod constat saltem officiali, notario, promotore institiae et defensore vinculi." This piece of Maynooth's legislation really becomes surprising when you recall the words of canon 1576, "reprobata contraria consuetudine et revocato quolibet contrario privilegio". Where lack of man-power obtains, a request could be made to the Holy See that in formal marriage cases, the number of judges be reduced from three to one.

If deemed advisable an inter-diocesan committee could be appointed to study the various concessions made by the Holy See, and then a petition could be sent to Rome for whatever relief is deemed advisable.

We have opened this Convocation with Mass. The opening words of the Mass are those of the Psalm—*Judica me.* No doubt all of us are looking forward to good results from this two day session. One thought must remain supreme —the office we hold is sacred.

[8] *AAS*, 30-410.

[9] *AAS*, 33-363.

[10] *AAS*, 38-28.

[11] Conc. Plen. Hiberniae (1927) Decretum 457.

FUNDAMENTALS OF PSYCHIATRY IN RELATION TO THE ECCLESIASTICAL TRIBUNAL *

IT is good to see that in recent years members of the clergy and psychiatrists are meeting more often on common ground to discuss their everyday interests, mutual concerns and perennial problems.

The enormity of the problem of mental illness needs to be recognized. One person in seventeen in the United States becomes so mentally ill that he needs, for his protection or for that of society, to be admitted to a mental hospital.

Mental health is only relative. If, for example, a television show offered a prize for a perfect physical specimen to appear on their program, a multitude of persons could be found who could be adjudged perfect by all physical standards. But, if a television program were to offer a prize for a perfect specimen of mental health, no such person could be found.

Impairment of mental health may be minor, resulting in a condition we define as a Neurosis; or a major mental illness, which we call a Psychosis.

Psychoses may be separated into two main groups:

A. THOSE WITH A DISCOVERABLE CAUSE, that is, ills where we can find damage to the brain cells from injury or disease, with resultant abnormal changes in a person's thinking, acting and feeling.

(1) INFECTIONS: For example, Syphilis or Tuberculosis, where the causative organ invades the brain and damages the brain tissue.

(2) INTOXICATIONS: Some substances, drugs, chemicals or gases introduced into the system cause physical changes in the nerve cells with resultant abnormal mental states.

* Address delivered by Dr. John E. McGowan, M.D., of New York, N. Y., at the seventeenth annual National Meeting of The Canon Law Society of America, held October 25-26, 1955 at the Hotel Hershey, Hershey, Pennsylvania.

(3) INJURIES: Directly to the brain substance from skull fractures or concussions leave, as a result, greater or lesser impairment of brain function.

(4) DISTURBANCE OF CIRCULATION TO THE BRAIN: Hardening of the arteries to the brain results in the brain being deprived of the normal supply of blood, so mental malfunctioning results.

(5) SENILITY: A slow but gradual and progressive deterioration of the brain cells is an unhappy but not uncommon cause for psychoses in our present day world, when so many people survive to well over the old expectancy of three score and ten years.

B. THOSE PSYCHOSES FOR WHICH THE CAUSE HAS NOT YET BEEN DISCOVERED.

We classify these as "Functional" in contradistinction to the above which are called "Organic." We believe these functional ailments are of psychogenic origin. Here we find no clearly defined tangible change or structural cause in the central nervous system.

In view of the fact that ecclesiastical tribunals are requested to investigate and adjudicate cases of alleged nullity of marriage because of insanity, it is necessary that the officials of the tribunal, especially the judges, have a knowledge of the latest psychiatric teaching concerning at least those kinds of insanity which most frequently affect the mental competence of human individuals. I refer especially to those psychoses or species of insanity known as Schizophrenia (or Dementia Praecox) and Manic Depressive Psychosis.

I. SCHIZOPHRENIA (or DEMENTIA PRAECOX)

For the purposes of this paper these two terms are used synonymously. The original terms, Dementia Praecox, was applied to the disease process because the recognized mental illness appeared at or shortly after the time of puberty, and led to irrecoverable intellectual loss. The term Schizophrenia, or Split Mind, was later applied to the same disease entity,

to emphasize the definite dissociation between the emotional reactions and the thought content. Dementia Praecox is the most prevalent of all the diseases in the United States. The illness has certain characteristics and a rather typical course.

With special reference to marriage cases, it is necessary to determine (1) whether the disease actually existed at the time of the marriage, and (2) whether it had reached a serious degree of development; that is, that degree which took away that amount of discretion and judgment possessed by a person at the age of puberty. To determine these two points, it is helpful to chart the progress of this illness.

There are five factors we see entering into each case:

(1) The pre-psychotic personality make-up;
(2) The slow insidious onset;
(3) The early evidences which indicate the disease is present and active;
(4) The development of further signs and symptoms, such as stupor, delusions, hallucinations, bizarre acts, unusually asocial or antisocial behavior. These symptoms may or may not appear singly or in combination but are not invariably present in all types of the illness, as we shall see when we distinguish between the four types of schizophrenia;
(5) Eventual deterioration of the mental faculties in varying degree.

1. *The Pre-psychotic Personality Make-up.* This illness occurs in a person with a certain predisposed personality make-up. We say he is of the introverted or schizoid type. He commonly shows a greater or lesser degree of personality inadequacy, especially a marked tendency to withdraw from the realities of everyday life. He is shy, sensitive, retiring.

2. *The onset of the disease* is usually marked by a slow but progressive withdrawal from contact with people and activities in his environment. Exaggeration of previous personality traits is usually so slow and so unspectacular that the onset of the illness is not recognized by those around the person during

the time he goes from a schizoid reaction-pattern into the illness of schizophrenia.

3. *Signs of Active Illness.* The progress of the illness from a normal abnormality into an abnormal abnormality is so gradual that without sufficient information from reliable witnesses it is often extremely difficult to say at what particular time the disorder began. However, such signs as *excessive* and *particular* asocial behavior, shyness, timidity, day-dreaming, stubbornness, instability, seclusiveness, lack of close friends, and other unusual personality traits, which may not appear particularly important or significant to the family as being connected with the illness, may, in retrospect, be certain indications to the psychiatrist that the disease process had already set in at a particular time in the history of the illness.

Inability to function at a proper level of scholastic, social, or vocational adjustment may not indicate to members of the family or others in close contact with the individual that an illness is present until some rather abrupt happening arrests their attention. Often at this stage of the illness unmotivated outburts of weeping, anger, laughter, and excitement may be apparent.

Another indication that the abnormal process is at work in the mind at this stage is the appearance of inappropriate emotional reactions. Dullness, flatness, apathy, and indifference characterize their feelings, or they may burst out with peculiar emotional reactions in response to a very inappropriate cause, e.g., giggling instead of being sad, or being unjustifiably angry from a trivial cause.

4. *Further Development of the Illness.* From these common beginnings, the further course of the disease varies in each one of the four types of the illness. The expected end-result differs also. So at this point we will consider the sub-groups.

There are four distinct types of schizophrenia, each of which presents a clinical picture. However, it must be remembered that in all, the schizoid reaction and the progressive withdrawal are the chief indications of the disease.

(1) SIMPLE TYPE: This type of the disease usually has its onset at an early age, generally from sixteen to twenty. Shortly after puberty it becomes apparent the individual who has been able to make a marginal adjustment thus far in life finds life becoming more difficult. Unable to progress and mature to adulthood, the Simple Praecox regresses to a lower level of living. He loses interest in school and outside activities, and either finds some simple work or is maintained at home. For the rest of his life he essentially lives the life of a child in a world of adults.

In this type hallucinations and delusions may never appear. If the family will maintain them and give them shelter and security they adjust on a very simple level, and under such circumstances never need hospitalization. If the safe situation is taken away, or if the afflicted person undertakes too much responsibility, e.g., marriage, he breaks down completely, usually with episodes of excitement, sometimes accompanied by fleeting delusions or hallucinations.

(2) THE HEBEPHRENIC TYPE: This type usually occurs between the ages of eighteen to twenty-three and has a very slow and insidious onset. Progressive self-absorption, withdrawal from social and vocational activities, shutting himself away from even his family, are indications the disease is already present. Self-neglect, carelessness, and indifference to normal simple standards of conduct indicate deterioration of intellect. After the illness has been present for several years, delusions and auditory and visual hallucinations are openly apparent. The patient's further course is then rapidly downward with extreme dilapidation of intellect. He continues to regress until he becomes helpless, having to be clothed and have his hygienic needs cared for as though he was an infant. This particular type of schizophrenia usually presents the worst prognosis.

(3) THE CATATONIC TYPE: In contrast with the other types, the full-blown signs of the psychosis appear abruptly. However, the life history shows the schizophrenic seclusiveness, inability to form normal relationships with others; moody,

silent, abstracted, self-absorbed episodes indicate the disease process was already present years before the eruption of the acute symptoms. Here, a stupor state is usual. The catatonic literally leaves the world of reality; he stops talking, eating, and has no contact with what goes on about him. Some cases show, alternating with the stupor state, spells of wild excitement and assaultive behavior. Hallucinations and delusions appear to be present but, since they are out of contact to questioning, the ideational content cannot be ascertained.

(4) THE PARANOID TYPE: This occurs in an older age group and usually in persons of the higher intellectual brackets. The onset is always slow. It occurs in a person who originally has been an introvert and who, as years go by, becomes unhappy, unsuccessful, and suspicious. He usually develops well-defined delusional ideas, starting with a false premise and from that works up a complex structure of delusions. Since he is unsuccessful in the normal world, in his delusions he becomes a person of great prominence, authority, and of great power. He feels an individual or a group of individuals are against him. Suspicions of infidelity, or the certainty that friends or groups of his fellow workers are his enemies, are common. Delusions of bodily influence or control, or delusions that he is being spied upon by mechanical means such as electricity, radio, or television, are common. He has ideas of reference in that he mistakes a normal motion or statement made by some other person to relate to himself, such as a group of people, conversing, are talking about him, or that a word or a gesture is a signal to him or someone else. He may retain his ideas for years while leading a fairly normal life but, of his delusions become too troublesome to him, he reacts in accordance with his ideas and may even be homicidal.

Externally he keeps up a good appearance. He may achieve what seems to be an ordinary business and even family life for years before the delusions and hallucinations break out

into the open. We accept the fact that here, as in any other type of the disease, there is no adequate insight.

For descriptive purposes it is easy to make such clear-cut entities as the four types we have mentioned but, practically, there is generally an admixture of some features of all types of the illness present in any one case. Often it is not until the end stage of the disease that the correct and final diagnosis can be made.

Therefore, in a matrimonial trial we are not so concerned with what type of symptoms predominate as we are with how serious are the symptoms at the time of the marriage and how sharp is the break with reality, and how much loss of emotional control, reason, and judgment exists.

5. *Eventual Deterioration of the Mental Faculties in Varying Degree.* Medically speaking, Schizophrenia is generally considered to be a continuous, chronic, maiming illness with never a recovery in the fullest sense. The general rule is "Once a Schizophrenic, always a Schizophrenic."

Since, generally speaking, Schizophrenia is a continuous, incurable, deteriorating disease-process, once it has been proved that this disease existed in a serious stage of development it is presumed, medically speaking, to continue to be present in the same serious stage unless it is proved, by certain and evident arguments, that all traces of Schizophrenic thinking, feeling, and acting have completely disappeared.

However, since we are dealing with a disease of unknown cause and for which we have no specific treatment, we cannot make a universal rule to this effect.

It must be remembered the illness may be present in greater or less degree of seriousness or that it may be halted at any stage or there may be some apparent improvement, if not recovery.

Therefore, each individual case has to be judged on its own merits, and the presence and the seriousness of the stage of the disease at the time of marriage have to be determined in the individual case.

II. Manic Depressive Psychosis

Manic Depressive Psychosis is a mental illness of unknown cause. It is characterized by periods of abnormal variability of the mood and uncontrollable emotional swings with heightening or depression of feelings. Its onset is usually between the ages of 20 and 30 and occurs in women twice as often as in men. In general, a particular occurrence, or mental trauma, precipitates the illness; e.g., physical illness, disappointment in love, pregnancy, birth, death of loved one, or loss of employment, etc. It occurs in persons of the extroverted type of personality, in contrast with the introverted personality type who develops schizophrenia.

There are several types of the disease. The onset is always abrupt. In the *Manic Type* there is an unusual elevation of mood, a flight of ideas, and a greatly increased motor activity. In the *Depressed Type* there is a depression of mood, a paucity of ideas, and a diminution of motor activity. In the Manic Type, grandiose delusions are apt to be present, in a florid way. In the Depressed Type, delusions of nihilism, depersonalization, and impending harm are common.

These are the more common types but, in addition, there is a *Mixed Type*, characterized chiefly by an agitated depression. Characteristically, each individual who suffers from the disease presents his own individual pattern as to the frequency, severity, and duration of each attack. In some persons the pattern is repeatedly one of Manic attacks, while in others there is usually repeated depression.

In Manic Depressive Psychosis, generally speaking, we have a totally different situation with regard to the presence of lucid intervals than we do in Schizophrenia.

Between the episodic attacks of Manic Depressive Psychosis the person is clear mentally and is capable of making valid decisions. The exception is in another more malignant form of the illness which is referred to as the *Circular Type*, or Circular Insanity. In this condition the afflicted person goes from an attack of the Manic Type into an attack of the Depressed Type with no free interval between these two types,

and acute symptoms of either one or the other are always present. Here there are, of course, no lucid intervals.

With reference to the Manic Depressive Psychosis, it is necessary to point out that since this disease is characterized by recurrence and complete recovery, it is not enough to prove a person had this illness before his marriage *or* before and after his marriage but it must be proved that signs of a psychosis of serious degree were present at the time of the marriage or at least up to a time very shortly before the marriage, and again very shortly after the marriage.

LUCID INTERVALS

This brings up the troublesome question of the so-called "lucid interval", which has plagued psychiatrists and members of tribunals for so many years. In the present state of our knowledge, it is safe to say that *in almost all* cases of Dementia Praecox, because of the very nature of the disease, its chronicity and destructive actions upon the thinking and emotions, a lucid interval cannot exist in a sick brain. Yet in some rare cases, the disease improves to such a stage it can be morally and medically certain the person afflicted with Schizophrenia has regained the ability to properly enter into a marriage contract. This is a rare exception to the general rule, but it does occur. Therefore we say, there are no absolute judgments which apply to all cases of illness, but each case follows its own course and must be reviewed in this light.

On the other hand, in cases of Manic Depressive Psychosis, we not infrequently encounter cases showing complete recovery between episodes of this recurrent type of illness. Here we are often able to feel the patient is quite capable of reasoning and making proper use of the will.

Cases coming before the tribunal usually may be divided into two classes. In one class there is no history of treatment for mental illness prior to marriage, with a psychosis being recognized only after marriage. In these cases it is more difficult to determine in retrospect, whether the illness existed

before marriage, and to such a serious degree that it was present on the date of the marriage.

In the other classification medical records are available to indicate psychosis and hospitalization before and after marriage. In these cases the question still remains as to whether the disease process existed to a serious degree between hospitalizations.

Here the available evidence—from the family, friends, employers, etc.—should ideally provide the answer in determining the chronicity and stage of the disease. However, in many instances the evidence is not forthcoming for one reason or another.

In the first class, where no psychosis was recognized as such before marriage, the picture is often so clear it is evident that the family and intimates did not recognize the fact that the patient was mentally ill, or, if they did, they refused to admit his condition. The standards of the family and environment might be low and what should have indicated abnormality was accepted as personal eccentricities.

The fiancé or fiancée, being in love and preoccupied with his own emotions prior to marriage, is sometimes not too helpful in volunteering what may be important information.

The condition of many truly psychotic returned servicemen after the war was not admitted to exist by their families, and many girls who subsequently became petitioners, admitted they knew their fiancés were "sick and nervous" but thought they would "straighten out when married." Many parents even urged psychotic sons into marriage as a supposed cure for the abnormal condition.

Therefore, the tribunal and the psychiatrists are finally faced with the problem of deciding the exact state of mind of the person on his or her wedding day. From whatever information is made available from medical records and other documents or the testimony of witnesses, we can best deal with the $64,000 question as to the mental condition as of the day of the marriage ceremony of the party in question, by examining carefully and in detail the quality of the thinking,

acting, and feeling of the person at that time. Whether the initial diagnosis was Dementia Praecox or Manic Depressive we must seek the answer in this type of question:—

THE THINKING:

Was the individual able to react normally or abnormally to common everyday experiences, and to show average and expected reactions to usual experiences? Was he able to carry on coherent conversations? Were replies to questions relevant? Were spontaneous remarks indicative of scattering of thought? Were any trend reactions apparent? Were distorted, twisted, and labyrinthine thought patterns shown? Was there an abnormal concern for abstract theories at the expense of practical matters?

THE ACTING:

Did the external behavior of the person conform to the environmental pattern expected? Were responsibilities undertaken? Were the interpersonal relationships normal? Were patterns of dress, appearance, and social relationship unusual? At work or in a social situation were there any unusual acts which attracted comment?

THE FEELINGS:

Were emotionally appropriate responses shown? Were there uncalled-for outbursts of inappropriate behavior? Of assaultive, aggressive action?

Was the feeling-tone flat?—no proper response to a given situation?

CASES IN ILLUSTRATION

Dementia Praecox, Simple Type:

This man was 20 years old when he married. His history indicated he dropped out of school at the age of 16. For several years he worked as a handyman in a position with no responsibility. He impulsively married a girl he had known for only one month. Three months later his wife became pregnant. He showed no normal interest in his home or occu-

pation. He would quarrel and complain constantly in a childish fashion with his wife. One night he left home, went to his parents and did not return. He furnished his wife with no support until she went to court about this. He remained separated from his wife. When she delivered the child he paid several visits to the hospital but was quite apathetic and would undertake no responsibility for his wife or child. The welfare department tried to salvage the marriage and for awhile he remained at home but was annoyed by the baby, complained constantly and finally left home again. He hitch-hiked around the country for several months; was arrested. When the family went for him he was dishevelled, dirty, deteriorated. He was placed in a state hospital fourteen months after marriage and is a chronic patient there now, six years later.

At no time did he show any delusions or have any hallucinatory experiences. However, the history in this case was so typical, and as it was apparent psychiatrically he was suffering from Dementia Praecox, a declaration of nullity was granted.

Dementia Praecox, Hebephrenic:

A 21 year old woman, a high school graduate who had worked for a time in an insurance office until she became concerned about her social and vocational inadequacies, retired to her home and was cared for by her mother and father. She was quite shy, lost all interest in her old friends, dropped out of her church societies, and would not attend social functions. Finally, through the efforts of her older sister, she met and married a young man. Despite her retiring behavior, she still dressed well and made a good superficial impression, although any prolonged contact with her revealed her shallowness of thought and emotions.

Eventually she had two children in the three years following her marriage. Three months after the birth of the second child she began to neglect her children, herself, her husband,

and her home. After being hospitalized she regressed rapidly, expressed delusions of grandeur in that she was a successful mother, was talented and beautiful, etc., yet she neglected her self-care and was totally unable to comply with the simplest of hospital procedures. After a year's stay in the hospital with some improvement she was given a year's try on convalescent status, but broke down again in the same manner and now has been in the hospital for five years.

Since it was not possible to prove without doubt she was psychotic at the time of her marriage a declaration of nullity was not granted in this case.

Dementia Praecox, Catatonic:

A 28 year old man had a history that when he was in the second year of college he was called into the Armed Services. It was his first time away from home. In his tenth week of service he became morose, moody, depressed, and impulsively struck a sergeant. When brought to the station hospital he went into a real catatonic state. When visited by his parents and fiancée he showed absolutely no response to their presence. He was released against advice. He received electric shock therapy and was apparently well for almost a year. Then he became disinterested in carrying on normal social contacts. He quit one job after another in an irresponsible fashion. He had been semi-engaged for many years and although he had no great interest in marriage, both families favored it. His mother bought an engagement ring, which he gave his fiancée. The fiancée and the mother made all of the arrangements for renting an apartment, furnishing it, and taking care of the wedding, reception and honeymoon plans. After marriage his wife continued to work while he stayed home. Whenever company came to visit them, he would go into another room and play with his electric trains. He would quarrel with his wife, insisting any visitors were an unnecessary intrusion upon their privacy. He became more and more dull, self-absorbed, neglectful of his appearance and cleanliness, and finally refused to go out of his home. His wife,

being convinced he was unable to be a proper farther and husband, left him. For a time he lived with his parents but became disturbed and assaultive and has been hospitalized since. A declaration of nullity could be issued here because there was a demonstrable continuance of abnormal reaction from the time he was first hospitalized before marriage, to and through the wedding ceremony and continously thereafter.

Dementia Praecox, Paranoid Type:

This 28 year old man was a fireman on a railroad. He had a good work record and done well in his three years' service in the Army. After he returned to civilian life it was apparent he was unable to get along with his co-workers, was abusive to those in authority and indicated he thought everyone was against him. Because he was a good worker he was transferred from one division to another of the railroad in hopes he would find a position to which he could adjust. His wife said that all during their courtship she heard him express nothing but tirades against the officials of the railroad system and the union. He was abnormally jealous of her, would curse at and offer to fight men at a dance—men whom he thought were interested in her, and was unduly suspicious of other men in restaurants and other public places, thinking they were making advances to his fiancée.

After marriage he immediately began to question his wife's actions during the day. He accused her of being unfaithful with their landlord and various tradesmen. For this reason he insisted they move several times in three years. He was finally arrested for assaulting his father-in-law, who tried to reason with him about his delusions. He was transferred to a hospital where he revealed that since his return to civilian life he thought everyone was "out to get him" and that through favoritism he had been discriminated against in his work on the railroad. He continued to cling to his delusion his wife was unfaithful to him.

Here again, since his thinking, acting, and feeling before marriage and after marriage were a continuation along the same abnormal lines, a declaration of nullity could be granted.

Manic Depressive Psychosis; Manic:

At the time this girl was 17 years old, the parents were separated and she was placed in a boarding school. Almost immediately she went into a period of wild excitement, over-activity, expressed abnormal criticism of the school authorities, and grandiose ideas as to how she would improve the school. She became so intractable she had to be removed to a private sanitarium where she spent four months. At the end of this time she seemed recovered. She made a good adjustment and eight years later became engaged to a friend of her older brother. Her fiancé was fifteen years her senior. She told her friends she was not greatly in love but thought it best for her future that she should marry. For the few weeks before the marriage she showed an abnormal concern with preparations for the wedding, and little concern for her fiancé. She occupied herself with terrific energy in the formalities of the wedding, details of the bridesmaids, the reception, etc. She was unable to sleep well and her employer reported she accomplished little work at the office.

She was highly excitable at the wedding rehearsal three nights before the wedding and was quarrelsome with her prospective bridegroom. The night before the wedding she kept her roommate awake most of the night, talking about marriage, its responsibilities, etc. She delayed the wedding ceremony for one hour due to her insistence on perfection of her gown, flowers, etc. At the wedding reception she was hilarious, over-active, and was talking constantly. When they left on their honeymoon by plane the same day, she was so noisy she attracted the attention of all the other passengers. On the wedding night she refused relations with her husband, quarreled over nothing with him, and spent all night telephoning her friends. The next day when she became so disturbed the hotel requested they leave, she became so angry she jumped out of the hotel window, badly injuring herself.

In this case although eight years had elapsed between the attacks of psychosis, it was apparent the Manic Depressive episode was present in a serious degree just before the marriage, during the marriage, and after the marriage so that a declaration of nullity would be justified.

Manic Depressive Psychosis; Depressed Type:

This 24 year old man was an orphan and brought up by his aunt and uncle. When his uncle died at the time the boy was eighteen years old, he became unreasonably depressed in relation to this loss, left high school, had no contact with his friends, and led a solitary, depressed existence for six months. He finally finished school, went to work and was moderately successful and to all outward appearances was cured of his mental illness, as is usual with Manic Depressive Psychosis.

Three years later he married a girl who worked in the same plant with him. His friends, fellow employees, employer and fiancée said he seemed to be in perfect health in all respects at the time of his marriage. Two years after marriage his company was merged and through no fault of his own he was left unemployed. At first he tried hard for a new position but became quickly discouraged and embittered. He expressed ideas of futility and hopelessness. A suicidal attempt caused him to be hospitalized and with electric shock he made what appeared to be a total recovery after two months in the hospital. His wife, fearing a repetition of further trouble in the future, sought a declaration of nullity. Since there was no indication whatsoever he was not mentally well at the time of his marriage, a favorable decision could not be given.

I wish to emphasize, in closing, that this paper contains only a summary of the latest medical teaching concerning the effect of the common types of insanity on the mental competence required to contract a valid marriage. Hence I wish to recommend, with respect, that, in addition to the volumes of the decisions of the Tribunal of the Sacred Roman Rota, at least one or two of the recognized manuals or textbooks on psychiatry be kept available for constant study and reference.

MENTAL DISEASE AND THE ECCLESIASTICAL COURTS *

THE contents of this paper seem to me somewhat elementary for this audience, but I have been counseled by those much wiser than I to the effect that a simple declaration of the proper procedure in insanity cases and the attitude of the Rota as manifested over the years, is most acceptable and valuable. Consequently, I am merely reaffirming what is in the Code, in the *Provida Mater*, and in Rota decisions which must be familiar to all of you, but which may yet be useful, because it condenses into the space of half an hour, a great deal of legislation and a number of judicial decisions about mental disease.

The task before the Judge in a marriage case involving a plea for declaration of nullity on the grounds of insanity of one of the parties is a very difficult one. He is not asked to pronounce upon the sanity of one who stands or sits or lies before him here and now; by the time the case reaches him, it is abundantly evident that the person in question is not *sui compos*; if he were, the case would hardly be before the Court. Besides, cases in which one of the parties was openly and obviously insane at the time of the actual marriage are extremely rare, for few people will marry a recognized lunatic, and even fewer priests or civil or other authorities could be persuaded to officiate at such a marriage. No, the Courts must normally deal with the determination of the ability of a person to have given matrimonial consent at the time of entering the contract of marriage, which is anywhere from months to years in the past, and in a case where the signs were not so obvious at the time as to make the partner or official

* Address delivered by the Right Reverend John J. Hayes, Officialis, Diocese of Bridgeport, at the seventeenth annual National Meeting of The Canon Law Society of America, held October 25-26, 1955, at Hotel Hershey, Hershey, Pennsylvania.

witness refuse to go on. It is good that a corpus of law, precedent and presumption, has been built up for the Judge's guidance, and it is a pleasure for me to trace the consistency, the wisdom, the clarity, the essential saneness and even shrewdness of Church legislators and especially Courts in this important matter.

I have called this an important matter, and indeed it is. Anything is important which deals with the progressive deterioration of the human intellect and personality, and our responsibility in the premises is grave indeed. Besides, the mere incidence of these cases is already on the increase; one of the first things that impressed me as I thumbed through the Rota cases in a preliminary survey for this paper was the sheer numerical increase of insanity cases proportionately to others. Obviously, the enormous increase in mental disease in our time already makes its mark upon our Courts; the promise is that this tendency will continue, unless some new drug or technique of treatment be discovered.

In the face of this vast and continuous increase in the number of those afflicted with mental disease, it is good to know that the Rota (and other courts following it) has been moving steadily and consistently towards a jurisprudence in the field of mental disease which gives substantial guidance to any local ecclesiastical Judge in marriage cases. The *de iure* portion of one decision after another presents a series of considerations which by this time form a body of precedent which it would be difficult to assail.

Incidentally, it is quite significant that we find the Rota and other ecclesiastical Courts dealing so largely with cases of mental disease so soon after the development of modern psychiatry. It is a common charge against all Courts, civil and ecclesiastical, that they run a generation or two behind the times, that they are so rigidly determined to abide by the principle *stare decisis* that they are relatively blind to newly discovered facts, and theories, and circumstances which might justly challenge precedent. Thus, in our own country, and

in recent times, Mr. Roosevelt attempted to defend his desire to pack the Supreme Court with judges of his choosing (and his philosophy) by presidential jibes at the "nine old men" and with the charge that the court was still living in "horse and buggy days." Regardless of the merits of this particular case, we know it is common for people in litigation to criticize courts as cold-hearted, unfeeling, unsympathetic, too much absorbed in past principles and precedents to see present realities and see them whole.

It is good, therefore, that in this agonizing matter of mental disease, the Rota (and following the Rota, other courts) has been modern in its knowledge of the field. For this matter of mental disease is truly especially agonizing in our time. Dr. Braceland [1] remarks in his book issued just this year, that if any other disease were on the increase at the same rate as mental disease, a state of national emergency would be declared. There are more people in mental hospitals than there are students in all our colleges and universities. Mental disease is a pressing problem.

Another sidelight of interest here is that the attitude of ecclesiastical Courts toward the psychiatric profession will undoubtedly have historical value in defense of the Church. In our day, there is a widespread misconception that there is a basic conflict between psychiatry and Catholicism. It is difficult to understand why. The Church has made its position in the matter abundantly clear. Our Holy Father has spoken on the subject to various audiences, and each time has expressed his opposition to the extreme atheistic, materialistic, determinists in the psychiatric profession, while insisting upon the fact that there is no conflict between sound psychiatry and true religion. Similarly, the ecclesiastical Courts rely upon the testimony of psychiatrists, recognize their interpretations of symptoms and, in general, treat the psychiatrists with a respect which reflects a conviction of the

[1] Francis J. Braceland, M.D., *Faith, Reason and Modern Psychiatry*, (Kenedy, 1955), p. 8.

entirely acceptable standing of the profession. Beyond this, it is a common practice among the clergy to refer emotionally and mentally disturbed persons to individual psychiatrists. Psychiatric hospitals and psychiatric wards are under Church direction. Priests practice the psychiatric profession.

It is an outstanding example of the persistence of error, that against such a background the idea can exist that there is a fundamental conflict between Catholicism and psychiatry. Why does the false idea live on? We do not know. Perhaps it is because the atheistic, pan-sexualist wing of the profession is so voluble and vociferous. Perhaps in answering their absurdities we have not always been careful to make clear the fact that in fighting *them* we are not indicting all psychiatry.

Last May an article appeared in the *Woman's Home Companion* on the subject, "What Does Your Church Think of Psychiatry?" In the course of this article reference was made to the fact that people wishing information about Catholicism and psychiatry should write to the Guild of Catholic Psychiatrists, Stamford, Connecticut. I mention this because of the fact that in the following two months I received 1431 letters and post cards seeking information about psychiatry and religion; and 812 of these correspondents expressed varying degrees of surprise that Catholics could have anything to do with psychiatry! Sooner or later this misconception will be eradicated, but we may rest assured that there will be those who will continue to insist for years to come, that the Church in the beginning opposed psychiatry. Meanwhile, the Rota and our other Courts are building up proof to the contrary. This will be a valuable polemical weapon for us through the years.

The Rota uses the words "amentia" and "dementia" in discussing mental illness. It should be noted that these words as used by the Rota have no particular relationship to the meaning of these terms on the lips of a modern psychiatrist. The Rota by "dementia" seems to mean monomania, or fixed ideas, and if these fixed ideas be outside the area of the marriage contract, valid consent would be possible.

"Amentia" quite clearly indicates to us a state of true insanity causing an inability for responsible action or true consent. We may well thank God that the Rota has used these words so consistently; one can understand the nature of the illness in question in any particular case by reading the description of the illness, its symptoms and developments, in the Court records. Had the Rota adapted the rich and confusing terminology of a growing and eager psychiatric profession, we might have been driven to despair. To know what I mean, I advise any one of you to take up a book on modern psychiatry, let us say Odenwald and Van Der Veldt, or Cavanagh and McGoldrick, and see there, the hundreds of divisions and subdivisions of mental disease. We know what the Rota means and that, in this our day, is a gain indeed. Generally speaking, the Rota supports the nullity of marriage in cases of proved amentia. In general terms again, it normally holds for the validity of the marriage in cases of dementia.

Insanity cases are admissible in our Courts only because the "consent of the parties" makes marriage and without it, a marriage is impossible.[2] Whether the other party knows about the insanity at the time is irrelevant. If he is truly insane, matrimonial consent is closed to him.[3] What degree of discretion must a man or woman have to give such consent as is required? This question has been long and much debated, and a definitive apodictic fixed rule can hardly be set. Consequently, the nub of many a marriage case is precisely here. Has the mental disease at the time of the marriage reached such a point that consent is *now* impossible? Certainly, greater discretion is necessary than that required to commit a mortal sin. And certainly, one of the great questions in the field of legal medicine is that of the responsibility of the psychotic person for his acts, with opinion more and more inclined to deny such responsibility. Of course the

2 *Coram* Jullien *omnibus videntibus*, 5-VII, 1947.

3 *Coram* Jullien, 16-III, 1943.

materialistic determinists are forced on a priori grounds to deny all true responsibility for anybody about anything; but there are those among psychiatrists of sound background and good philosophy who, nevertheless, deny true responsibility in persons afflicted with certain types of mental illness. The insight required for marriage being greater than for mortal sin, an a fortiori argument against the validity of marriage in such cases is admissible. The Rota is on record very clearly on the subject of how much discretion is required for matrimonial consent, and its attitude is sane and shrewd and sound. In a Rota case [4] the Judge was asked to sit on a matter which involved a person who, it was claimed, was incapable of appreciating the "ethical side" of marriage, although rational in other respects. This man's relationship with women for many, many years had been of an exclusively trifling nature. It was argued that because over so long a period he had had one affair after another with several women, he was psychologically incapable of comprehending the concept of a union with a woman which would be sacred and exclusive and permanent. In other words, he was unable to give true consent to marriage.

In this case, the psychiatric expert retained by the Rota itself held that Tito, the husband, although intelligent (he was a lawyer, but with a history of narcotic addiction), was incapable of valid matrimonial consent. "Given his constitutional immorality," said the expert, "he could not evaluate sufficiently the ethical side of the marriage act, much less the importance of the duties that derive from this act. He understood the act that he performed, but he did not freely determine himself to it. Consequently, Signor Tito should be held irresponsible both from the moral and the juridical viewpoint." [5]

[4] *Causa nullitatis matrimonii coram* Wynen, Feb. 24, 1941.

[5] *Sacrae Romanae Rotae Decisiones*, vol. 33, Decisio 15, *Nullitas Matrimonii coram* Wynen, Feb. 25, 1941, pp. 144-168 at p. 148, Rome: Typis Polyglottis Vaticanis, 1950.

There was much more expert testimony to the same effect, but in the end, the Court refused to declare the marriage null. The factual evidence of mental incapacity at the time of the marriage itself and for the three years preceding it and the three years following it, was very weak. The significant thing to my mind is the fact that the learned and influential judge, Monsignor Arthur Wynen, thought it necessary to examine at great length the psychological and psychiatric grounds alleged, and furthermore, that he admitted as a matter of principle and as not inconsistent with scholastic philosophy and theology, that it is not enough, for freedom and imputability, that there be a mere conceptual cognition; there is required in addition, the ability to weigh and evaluate the substantial elements of the proposed action. The following are excerpts from his opinion: [6]

"... In not a few judgments there is really a twofold cognitive function which can be and should be distinguished; the one merely representative or *conceptual*, the other, deliberative or *evaluative*; and this twofold function is principally in evidence in judgements which concern 'practicable things' ('*agibilia*'), in other words in practical judgements. The merely conceptual cognition expresses *what* the object of cognition *is*, the evaluative cognition expresses what importance or worth it has, or *what value it has*. Generally, a man perceives both aspects together in the same act of cognition; especially an adult in those matters which pertain to ordinary, everyday experience. But neither factually nor conceptually, do these two cognitions express the same thing; they express rather *diverse aspects* of the same object. Experience shows that the merely conceptual judgement is formed earlier and much more easily; an evaluative cognition is acquired later and with more difficulty. Furthermore, it is to be noted, that the *use of reason* which is required for every human act, regards both conceptual cognition and evaluative cognition, and demands a capacity both for the *exercise* of reason, and

[6] *Loc. cit.*, pp. 149-151.

for the *dominion* of reason, that is, the capacity of a man to dispose of himself and of his action according to that two-fold cognition of the object . . .

" Now it is one thing for a man to *lack* the requisite evaluative cognition, and another for him to *pay no attention* to it. A child of five years who sets fire to his father's hayloft, although he has conceptual cognition both of the hayloft and the fire, *does not have* evaluative cognition *of the crime*, that is the *objectively very serious* violation of right order which he perpetrates; and consequently, this violation cannot be imputed to him. He does have, however, both conceptual and evaluative cognition of his act inasmuch as it is *a wrongful childish deed*, and accordingly, in this respect, his action is imputed to him and is deserving of punishment. But an adult who posits the same external act, generally has not only conceptual cognition, but also evaluative cognition of the crime he commits, but he pays no attention to it; because notwithstanding it, he proceeds to the commission of the crime, and therefore, he should be fully accountable for it. And this essential difference between child and adult as regards the imputability of their own acts, obtains even more in civil law and especially in the law of contracts than it does in criminal law. A child of five years, who spends a thousand lire on sports and childish amusements, although he may perhaps understand very well conceptually what a thousand lire are, and what sports and amusements are, and what buying and selling are, nevertheless, because he lacks the necessary mental development and maturity, is not yet able to *evaluate and weigh*, not even as to substantials, what it is to spend a thousand lire on sports and amusements. Therefore, even from the viewpoint of natural law alone, he must be said *to contract invalidly*.

" Whenever a man, who because of his age is presumed to be endowed with the power of sufficiently evaluating something is said nevertheless, to have acted without sufficient evaluative cognition, that can arise either from the fact that

he *did not want*, or from the fact that he *was unable*, to evaluate or weigh the proposed action sufficiently. One who *does not want* to acquire this knowledge will generally not escape either the subjective imputability or the objective obligatory force of his act, since he affects ignorance, and it is hardly ever possible to discern whether sufficient evaluative cognition was lacking—at least of a confused and implicit kind. But one who *is unable* to evaluate at least the substance of the proposed action, is obstructed in his natural power of appreciation, either by an impediment which is merely temporary and transitory (drunkenness, delirium, violent fever, etc.) or by an habitual defect (whether congenital or acquired during the course of his life); this type of habitual defect is present in not a few mental diseases and psychic anomalies, among which in recent times has been numbered so-called constitutional immorality."

This case has now been made the subject of a juridical monograph by an Italian Jesuit, Father G. M. Fazzari, S.J.[7] I have not been able to read this essay, but from various reviews of it, gather the following: After examining matrimonial consent from all sides, including its affective elements, the author concludes that "constitutional immorality" can amount to a psychic incapacity to give valid consent. "The use of reason, which is required in order not to be ignorant (of the substantials of marriage within the meaning of Canon 1082) is not sufficient for the capacity to give a valid consent" according to this author. There is required in addition, "a maturity and normalcy of psychic links (*collegamenti*) which permit the spontaneous transformation of the knowledge of marriage into a rational appreciation, at least confused and implicit, of all its essential aspects, particularly the ethical."[8]

[7] *Valutazione etica e consenso matrimoniale* (*Ethical Evaluation and Matrimonial Consent*), Naples: M. D. D'Auria, 1951.

[8] Fazzari's book is reviewed by Rebecchi in *Divus Thomas* (Piacenza) 56 (Jan.-March, 1953), p. 155; another review appears in *Estudios Ecclesiasticos*, 27 (July-Sept., 1953).

It seems to me very significant that a Judge of the standing of Monsignor Wynen would concede the possibility of deciding a case on the grounds of lack of evaluative consent, and the essay of Father Fazzari is further evidence that modern psychological findings are making some impression. But I think it will be some time before marriages will be successfully attacked on these grounds. After all, the ecclesiastical Courts demand moral certainty that a given consent was invalid by reason of mental incapacity. Constitutional immorality is one of the more obscure chapters in psychiatric literature, as is also the mental illness of the so-called psychopath personality. If the Courts hesitate to accept the concurring opinions of many experts, as they did in the case just described, it is clear that there would be little hope of an annulment in a case where the experts disagreed. Psychiatric experts will be very likely to disagree as to the moral and legal responsibility of psychopaths.[9]

But whether in ecclesiastical or civil or criminal proceedings of any kind, the thing that prevents courts from accepting psychiatric findings seems to me to be the inability of the experts to agree among themselves. I have heard court officials complain that psychiatry is not scientific because you can always get good, reputable experts on both sides, whose testimony is diametrically opposed on the question on responsibility. I think the judges in ecclesiastical Courts are inclined to say to the psychiatrists: "First come to agreement among yourselves as to the findings of your science, and then we will listen to you." And they have the further reservation as to psychiatric testimony on responsibility: "If you are a psychiatrist who does not believe in free will anyway, we can-

[9] Hervey Cleckley, *The Mask of Sanity* (St. Louis: Mosby, 1950), considers psychopaths to be psychotics and largely irresponsible for their erratic behaviour. Cavanagh and McGoldrick, *Fundamental Psychiatry* (Milwaukee: Bruce, 1953), p. 464, have this to say: "In the present state of our knowledge and public opinion, we have little choice but to state, when asked for an opinion, that the psychopathic personality is legally responsible for his acts. Certainly he knows the difference between right and wrong, on an intellectual level at least, even if he does not accept it emotionally."

not help being suspicious when you testify that someone is not responsibile for something. Your denial of free will should logically, in our opinion, lead you to deny that anyone is ever responsible for anything." [10]

Again, the Rota has rejected the opinions of the experts with its reasons founded in the testimony of the *inexperti*, the relatives, the friends, the pastor of the party. Thus,[11] there is a record of a woman who was accused that because she used drugs excessively, she was constantly and habitually deprived of the use of reason for a long time before her marriage, and therefore, incapable of consent to the marriage contract. Three experts were called to testify as such, two *periti* and subsequently, a *peritior*. The two *periti* testified clearly that because of her addiction, the lady could not have sufficient power of mind and will for valid matrimonial consent. The *peritior* leaned in that direction without being quite so definite, but even some of his opinions and conclusions were rejected by the Court. This, on the basis that the pastor, relatives and friends believed her to enjoy sufficient powers of mind to enter upon a valid contract. They testified that she had freely and voluntarily given consent, that she truly loved her husband, and she desired the marriage. In giving a finding *non constare de nullitate*, the *Rota comments*:

"We say the *peritior* erred because he demands too much for valid contracting; not merely the use of reason, but sound critical acumen, prudence, wisdom, good judgement, etc. Also, he asks more of the will than is necessary. Granted, for the sake of argument, that the lady, without an injection of morphine, would not have given consent, this does not make her consent invalid. For it matters not *how* she is led to consent, whether altogether from within or also from some external incitement; it is required and suffices for valid contracting that the contracting party places a positive act of the will and legitimately manifests it. Nor has it been

[10] See Rota Decision (cited above in note 5), at pp. 166-167.

[11] *S. R. Rotae Decisiones*, XXIX (1937), 195-196.

demonstrated that the lady was incapable of placing such an act; the contrary is evident. For, overcoming the opposition of her family and her own subjective uncertainty, she actually decided to get married, prepared everything necessary to this purpose, she went to church and there gave her consent. How the specialist judges from her antecedent uncertainty that her consent is invalid, we do know know. These, then, are the reasons on account of which the judges reject the testimony of the specialist in favor of the nullity."

In these two cases, both of which I think interesting, the first, because of the recognition of some of the obscurer claims of modern psychology; the second, for its sanity and good sense in the presence of the somewhat precious reasoning of the experts, the Rota has stood for *validity*. But the traditions of the Rota in terms of true insanity are quite different. Let us look at the provisions regarding: (1) presumptions, (2) lucid intervals, (3) experts. The attitude of the Rota is so fixed that a marriage case entered on the ground of insanity stands or falls on the facts. The *law* is established. The precedents are clear and numerous; the presumptions are established in law. In all marriage cases:

1. The prevailing basic assumption is "*in dubio standum est pro valore matrimonii.*"

2. Also, there is a prevailing assumption in natural law that all men are sane, until the contrary is proved.

3. Then, there is a vastly important presumption regarding the lucid interval. When a person is known to have been insane before and after, there is an established presumption that he remained insane and incapable of consent during the interval. The period of intermission is presumed to be a lessening of the insanity rather than a cure because mental ailments are of their nature enduring.[12] This is all the more demonstrable today since modern medical opinion tends to view the lucid interval as a mere screening of latent insanity.

[12] *S. R. Rotae Deciones*, I (1909), Dec. 10, 17, 21, p. 92; 8 (1916) Dec. 19, n. 8, p. 209; 10 (1919) Dec. 18, n. 3, p. 143; 25 (1933) Dec. 47, n. 4, p. 408; 26 (1934), Dec. 83, n. 4, p. 710.

Civil codes usually deny recognition to contracts entered during such intervals.[13] Insanity is of an essentially degenerative nature. Having proved amentia antecedent and subsequent to marriage, concomitant amentia is rightly deduced, which is always true in those diseases which are rooted in congenital bases like "dementia praecox, sive hebefrenica sive paranoica."[14]

Lucid intervals mean a termination or even a temporary cessation of the signs of insanity, which does not mean that the patient is cured, but only that his underlying malady is obscured.[15] These presumptions, of course, as all presumptions in marriage cases, or in anything else for that matter, yield always to the facts. Indeed, the presumption requires the suppport of circumstances and evidence sufficient to raise it to the level of moral certitude in the judge, which is demanded for any judicial sentence. I do not suppose any judge would demand evidence of actual anterior delusions or hallucinations; but we certainly need evidence of some kind to indicate that the mental disease was already underway, such as excessively moody behavior, strange actions and statements, bizarre behavior (fixing people with stares, secret and furtive chucklings, etc.), any combination or all of which have weight as showing that the progressive deterioration has already begun. This lucid interval doctrine is now pretty well established. Occasionally, *Defensores Vinculi* in lower Courts will zealously argue against this lucid interval presumption (i.e., the presumption that there is no lucid interval) but they get nowhere and should get nowhere.

4. Another interesting and highly significant condition of insanity case hearings is that the Code (can. 1982) orders that the opinion of experts is to be sought. This is mandatory in Canon Law, not optional. This is something new in

[13] Gasparri, *De Matrimonio* (ed. nova, 1932), Vol. II, n. 785; Wanenmacher, *Canonical Evidence in Marriage Cases*, p. 296, n. 465.

[14] *S. R. Rotae Decisiones*, 7 (1915) Dec. 20, n. 38, pp. 230-231.

[15] *S. R. Rotae Decisiones*, 13 (1921) Dec. 5, n. 3, pp. 49-50.

the Code. The Rota as late as 1916 declared a marriage involving insanity null without having called upon any experts, and the judges wrote into their decision the fact that no law required the calling of experts.[16] Even now, the law demands the experts testimony only as a matter of liceity in the Court proceedings. A judge who reached a state of moral certitude without them would seem to pronounce sentence validly. The Rota speaks to the point here also: [17] "An expert must be called if it be necessary to detect the existence and nature of the insanity; but if there be present common signs by which any person of sense could know, especially when these signs are numerous and long-lasting, no expert need be called."

The expert is called to determine two things: (1) was the party sane? (2) Was his mental disease such that real consent to the contract of marriage was impossible? There is no limit on the number either way. The Code, using the plural, would suggest at least two; *Provida Mater* says one is enough in simple cases; the Rota [18] once used ten. Whoever they are, they should be eminent and competent, not necessarily Catholic, but "imbued with the Catholic doctrine on insanity." [19] And I may add, that we ought to be sure they know what we are after, i.e., the two questions with which I opened this paragraph: Was he sane? Could he consent?

Mental disease has many and wide and unpredictable ramifications. Various psychiatrists may hold widely differing opions on the nature or origin or course of the same disease. They may disagree violently upon many matters with which the disease is concerned. But much of this disagreement may from our point of view be simply irrelevant. Our concern is with the one simple question: "Was the person capable of giving consent?" Doctors who might agree on this one point affirmatively or negatively might differ on everything else, yet

[16] *S. R. Rotae Decisiones*, 8 (1916) Dec. 19, n. 12, p. 211.

[17] *S. R. Rotae Decisiones*, 15 (1923) Dec. 15, n. 15.

[18] *S. R. Rotae Decisiones*, 10 (1918) Dec. 1, n. 6, p. 6.

[19] *Provida Mater*, Art. 151.

we would have the consensus we ideally seek from the experts.

Both Canon Law and *Provida Mater* are anxious that the judges receive as complete a picture as possible of the illness which allegedly vitiates the consent. Therefore, the doctors who had treated the defendant before the case came up in Court are barred as experts, because they may already have formed their opinions; it is *required* that they be summoned as witnesses (can. 1982; *Provida Mater*, Art. 143.) Aside from thus providing a full picture, such witnesses can provide evidence for the experts in such times as the expert cannot examine the party because of absence or refusal to undergo an examination. The Code (can. 1982) directs an examination, with an eloquently shrugged "*si casus ferat.*"

Experts are chosen by the judge. We do not have the spectacle in ecclesiastical Courts of psychiatrists testifying to contradictions because they are "for the defense" or "for the plaintiff." After the testimony of the experts has been received, the Judge is free, in good conscience of course, to reject their testimony, to call other experts or one other of greater skill to look further into the matter. Nor at long last is he in anyway bound to follow the expert opinion, nor the opinion of the "more expert." [20] They are skilled in their field, but he is the judge. This is true even if they all concur, though one wonders about the quality of the judgment that would go against the unanimous concurring testimony of specially qualified experts in the field of their specialty. But of course there are many other elements in the proof of a case which might give the Judge reason for going against the experts and the judge must of course concern himself with all possible elements of proof which are available. Other witnesses should always be called to testify to the daily life of the person before and after the marriage, his mode and content in conversation, his attitudes, his insight, his mannerisms, his obsessions, his judgment of events, local, personal and public, his appreciation

[20] *S. R. Rotae Decisiones*, 20 (1928) Dec. 6, n. 36, pp. 80-81.

of his surroundings, his family relations, etc.[21] In spite of these other sources of proof, the Code (can. 1804, § 2) demands that a judge rejecting the opinion of experts must state the reasons upon which the rejection is based. This interestingly reverses the principle established by the Rota [22] saying it was not necessary to state the reasons for rejecting. Thus, while ordinarily he would and should accept the judgment of experts of whose competence and honesty he is satisfied,[23] the Judge remains the final voice in the solemn decision about the validity of the marriage contract which is, after all, a Sacrament. "Nam periti non sunt conjudices sed consiliarii tantum, nec eorum voto quantum vis erudito et concordi alligatur judex." [24]

Thus, the Judge is firmly protected against purely diagnostic medical decisions. It is good that he is; psychiatric theory is prolific and eloquent, but when it comes to individuals the theory, like statistics, breaks down. Each case must be judged separately on its own merits. There is a medical theory put forward to me recently by an able and generally conservative psychiatrist, that if a man actually develops openly, at the age of say 40, a certain constellation of symptoms, we can safely conclude that whether he gave evidence of it or not, he was already a victim of mental disease, already constitutionally incapable of sound judgment or valid consent to contract when he was 7 or 12 or 15 or 20, or any time up to the present. To this thesis Dr. Francis Braceland writes: [25]

"Frequently in marital situations, the question is asked whether this man knew what he was doing, and the psychiatrist is put on the spot. The answer is that he may have known what he was doing, and yet, have his judgment colored by delusions. For instance, there are many people who are

[21] *S. R. Rotae Decisiones*, 8 (1916) Dec. 19, n. 12, p. 211.

[22] *S. R. Rotae Decisiones*, 3 (1911) Dec. 39, n. 49, p. 454.

[23] *S. R. Rotae Decisiones*, 1 (1909) Dec. 10, n. 6, p. 87.

[24] *S. R. Rotae Decisiones*, 16 (1924) Dec. 16, n. 2, p. 128.

[25] Private letter to me dated Sept. 22, 1955.

teetering along outside of hospitals. They are borne up by the security of their families, the fact that people put up with their idosyncrasies, that the people in their jobs understand them, and they live narrow, constricted lives in which very few demands are made upon them. Then comes some type of stress, whether it is being taken into military service, an accident, a serious illness, or perhaps the feeling that he should be married. Many times this feeling that he should be married is simply because of what other people will think and someone gets picked out as the partner.

" If the individual is paranoid, if the individual is schizophrenic, or homosexual, this marriage will tip over the patient, not invariably, but nearly so, and as a consequence, there will be a psychotic break, and often a frank, open schizophrenia. *Now that patient was schizophrenic to begin with,* but he was compensated, as we say, just like a heart is compensated, and it is only under great stress, such as adjusting to another person, the sexual problems involved, etc., that he breaks. Mind you, he might have broken later anyhow, but this simply does it quickly. The job for the psychiatrist, therefore, is to determine the diagnosis. If the diagnosis is schizophrenia, this is not something which happens all at once; *this is a way of life, as it were; it has been coming on for a long time.*"

In this description, the actual marriage can be precisely the precipitating factor which brings out his insanity—not that he *now becomes* mentally ill and incapable of consent, *but that he always was and now we know it.* Similarly, Monsignor Fidecicchi says, " It happens frequently that the family and friends of the sick person do not notice the confusion of his mind, especially at the beginning of the insanity. Whence it follows that it is not unusual for a person to seem capable of carrying on his ordinary duties well—and yet he must be considered unfit for marriage—sometimes the violently insane remain in a state of apparent quiet and yet their actions are not those of their own mind."

In summary, then, the whole subject of mental disease in connection with the ecclesiastical Courts is one which will require increasing attention as the diseases themselves tend to become increasingly prevalent. In these circumstances, it is a consolation and a comfort to know that the jurisprudence of the Rota is quite clear on what we should do in the judging of such cases. There are certain mental diseases which of their nature allow a lucid interval in which marriage might be contracted validly. But there are other diseases in which it is no longer in accordance with precedent to assume a lucid interval. If it can be demonstrated that the person had been afflicted with this disease prior to and after the time in which the marriage was contracted, the established presumption is against the existence of any lucid interval.

Besides the establishment of presumptions with regard to the existence of a lucid interval, canon law and court practice have quite clearly outlined the place of the expert in cases of mental disease. He is to be consulted, his opinions are to be carefully pondered, but the Judge, in the final analysis, has full responsibility for the decision.

I hope that this paper may have clarified the principles and facts relative to mental disease and the ecclesiastical Courts, and that you may find it useful in time to come.

Cases and Studies

PUNITIVE MEASURES OF THE CHURCH AGAINST COMMUNISM

Decrees Against Communism

The Holy See has, in recent years, issued definite decrees and declarations dealing with Communism.

On July 1, 1949, the Congregation of the Holy Office published a decree affecting Catholics who are Communists. The Congregation announced, in the form of questions and answers, that Catholics who are members of the Communist Party may not receive the sacraments; that those who profess, defend, and propagate the materialistic and anti-Christian doctrine of Communism are apostates and, as such, are censured by excommunication specially reserved to the Apostolic See. According to the same decree, it is not permitted to publish, propagate, subscribe to, or read Communist books, magazines, newspapers, or pamphlets, in accordance with Canon 1399 of Church Law.[1]

Almost simultaneously, on June 20, 1949, a decree against the Communist sponsored " Catholic Action " in Czecho-Slovakia was issued. The so-called " Catholic Action " was a schismatic movement initiated by Communists with the help of some pro-Communist Catholic laymen and priests. The founders of the " Catholic Action ", at a meeting in Prague, on June 10, 1949, proclaimed themselves as representatives of the Catholic Church in Czecho-Slovakia and announced as their aim to promote the religious life in the country and to conclude an agreement between the State and Church. The Congregation of the Holy Office branded all founders, promoters, and members of the false " Catholic Action " as schismatics and apostates, censured by excommunication specially reserved to the Holy See.[2]

On June 29, 1950, the Congregation of the Council, insisting on existing Church laws, issued a decree announcing excommunication specially reserved to the Holy See of those who plot against legiti-

[1] *Acta Apostolicae Sedis*, XLI, 1949, p. 334.

[2] *Ibid.*, XLI, 1949, p. 333.

mate Church authority or who have seized Church offices, benefices, or dignities without canonical appointment, and upon those who take part in such abuses, whether they are priests or laymen.[3]

On July 28, 1950, a declaration in the form of an admonition of the Holy Office was published, announcing that Catholic children are not allowed to join Communist youth organizations where materialistic principles, immorality, and anti-religious spirit are instilled. Catholic parents registering their children in such organizations, and children participating therein must be denied the reception of the sacraments. Teachers who in such organizations spread anti-religious doctrines are punished by excommunication specially reserved to the Holy See.[4]

The decree of the Congregation of the Consistory of March 17, 1951, regarded Czecho-Slovakia specifically. It enumerated many anti-ecclesiastical Communist encroachments that bring about penalties according to existing Canon Law. Such encroachments are the hindering of bishops in the administration of their dioceses; the occupation of bishops' chanceries by canonically unauthorized persons; civil imprisonment and trial (in that order) of many bishops, and mistreatment and imprisonment of diocesan and religious priests. All these acts bring about the censure of excommunication simply or specially reserved to the Apostolic See.[5]

To cover possible contingencies, the Congregation of the Holy Office, on April 9, 1951, issued the decree of excommunication most specially reserved to the Holy See upon a bishop who consecrates a bishop without nomination and express confirmation by the Apostolic See and upon the person receiving such consecration, even if performed under great duress.[6]

Thus, the usual censure of Communists and their collaborators is the excommunication *latae sententiae*, incurred by the very transgression of the specific laws or precepts to which the censures are attached. The absolution of these censures is, practically in all cases, reserved to the Holy See.

[3] *Ibid.*, XLII, 1950, pp. 601-602.

[4] *Ibid.*, XLII, 1950, p. 553.

[5] *Ibid.*, XLIII, 1951, pp. 173-174.

[6] *Ibid.*, XLIII, 1951, pp. 217-218.

Effects of the Decrees

All these decrees and declarations, some of them specifically dealing with Czecho-Slovakia, provoked great concern. Excommunication became a subject of every day discussions. Some Catholic laymen empirically applied the decrees and fell into the excess of rigorism. The priests, as a rule, had a correct understanding of Church censures, although in some instances, they were rather inclined toward understatement, even when all the premises for excommunication seemed to be present.

The Communist government of Czecho-Slovakia, in turn, was deeply concerned about these canonical censures. The Communists denounced the anti-Communist decrees of the Holy See as acts of political bias, entirely void and null within the territory of Czecho-Slovakia. Bishops and priests enforcing Church censures on Communists and their collaborators were branded as traitors and treated as such. The recipients of the censures were taken under the protection of the Communist regime, and if they were priests, they were forced to stay in their offices, disregarding the censure.

The Meaning of Excommunication

Excommunication is a Church penalty by which a subject (by the sacrament of Baptism) of the Church is deprived of some spiritual benefits or of benefits connected with matters spiritual, because of obstinate violation of some law of the Church, until such time as he repents and obtains absolution.[7] In order to provide the basis for a censure, there must exist a grave, external, consummated crime, joined to contumacy.[8] As far as contumacy is concerned, in order to incur a censure *latae sententiae*, it is enough that the law or precept to which the censure is attached has been transgressed, unless the culprit is excused by a reason admitted in law.[9]

Any cause which excuses from grave imputability (and thus from mortal sin), if proved in the external forum, excuses from a penalty.[10] In case of doubt concerning the law itself (*dubium*

[7] Can. 2241, § 1.

[8] Can. 2242, § 1.

[9] Can. 2242, § 2.

[10] Can. 2218, § 2.

iuris), as well as in a doubt about the fact (*dubium facti*), the censure does not hold.[11] The reservation of the censure has to be interpreted in a strict sense[12] and the censures in general have to be explained in a milder way.[13] Penalties are not to be extended from person to person, or from case to case, though there exists the same or even greater reason, unless several persons participate in a crime in a manner that each one's cooperation was necessary to accomplish the crime.[14] The penalty attached to a law is not incurred unless the offense committed is complete in its kind, according to the proper meaning of the terms of the law.[15]

Ignorance and force which excuse from mortal sin, regularly excuse from Church censures. But whenever the law is violated by external action, the deliberate will is presumed in the external forum, until the contrary is proved.[16] Simulated ignorance (*ignorantia affectata*) does not excuse from any censure *l. s.*;[17] crass and supine ignorance (*ign. crassa et supina*) excuses from the censures only in case that a very great malice is required, expressed in Canon Law by the terms *praesumpserit*, *ausus fuerit*, *scienter*, *studiose*, *temerarie*, *consulto egerit*.[18] Great fear normally prevents excommunication, but not if the offense tends to contempt of faith, or of ecclesiastical authority, or to public injury of the spiritual welfare of the faithful.[19]

Applications

Excommunication is corrective punishment to induce the transgressor to repent and amend. Once he repents and amends, absolution can not be denied.[20] Even in punishing, the Church shows her maternal feelings toward her children. She punishes in ex-

[11] Can. 2245, § 4; can. 15; can. 2219, § 1.

[12] Can. 2246, § 2.

[13] Can. 2219, § 1.

[14] Can. 2219, § 3; 2231; 2209, §§ 1-3.

[15] Can. 2228.

[16] Can. 2200, § 2.

[17] Can. 2229, § 1.

[18] Can. 2229, § 2, § 3, 1°.

[19] Can. 2229, § 3, 3°; 2205, § 3.

[20] Can. 2248, § 2; 2242, § 3.

treme cases only, when real malice is present, and excusing or alleviating circumstances can hardly be adduced. After repentance and amendment, the Church is always ready to pardon.

Nevertheless, it would be laxity, to say the least, to pretend that hardly anyone has incurred the censure of excommunication connected with the anti-Communist decrees of the Holy See, as the Communists in Czecho-Slovakia are suggesting.

In Czecho-Slovakia, of 13,100,000 inhabitants, there are 1,577,300 registered Communists (1,385,610 in Czech territories and 191,690 in Slovakia). About 77% of the population in Czecho-Slovakia is Catholic. It is a fact that there are Czech and Slovak Catholics who are members of the Communist Party, some of them, perhaps, professing the materialistic and anti-Christian doctrine of Communism. There is no doubt that the papal decree excommunicating ideological Communists applies to such Catholics.

The Communist anti-Church onslaughts are a sad reality. Such were the schismatic " Catholic Action " movement established to entrap the Catholics of Czecho-Slovakia; the occupation of dioceses by " patriotic " priests; the banishment of legitimate Church authorities from performing their work; the imprisonment and sentencing of 14 bishops and hundreds of priests; the physical violence against the clergy; the confiscation of Church properties; the suppression of all monasteries and convents and violation of the papal enclosures, and suppression of practically all the Catholic press and supplanting it with a Communist press. All these acts are subject to censures of excommunication, which are automatically incurred by Catholics through the transgressions themselves.

Regarding laymen, there could, in some instances, be a doubt about the exact knowledge of the penalties attached to the aforementioned transgressions. The excommunication decrees covering ideological Communists and members of the schismatic " Catholic Action " in Czecho-Slovakia were sufficiently announced by the Czech and Slovak bishops and priests. The announcement of these decrees caused turmoil in Czecho-Slovakia in the summer of 1949. To pretend ignorance in this case would be *ignorantia affectata* which does not excuse from any Church punishment. The other anti-Communist decrees and declarations of the Apostolic See were successively made public by the Vatican Radio, and

widely spread through the grapevine.[21] Only the decree against the false "Catholic Action" uses the terms *scienter ac sponte*, in which case even crass and supine ignorance would excuse from Church censure. In all other cases a complete ignorance about the nature of those crimes and penalties would be necessary to excuse from excommunication. But such an ignorance can hardly be accepted under the premises.

Communist intimidation, inducing Catholics to participate in the afore-mentioned anti-Church machinations, does not excuse from excommunication on the basis that these delicts imply the contempt of faith or Church authorities, in which case even a grave fear does not prevent excommunication.

According to the spirit of the Church, as expressed in Canon Law, the application of censures should be restricted as much as possible. Nevertheless, someone bears full responsibility for the anti-Church attacks committed in Communist dominated countries. If there are Catholics among those responsible persons, they are subject to Church punishments.

It was repeatedly said in pro-Communist circles in Czecho-Slovakia that all priests who have incurred some censure by their bishops or by the Apostolic See, subsequently settled the matter and were absolved from the censures. It is true that whoever repents of the transgressions for which he has incurred the censure and makes amends, can not be denied absolution. In urgent cases, under specific premises, even an ordinary priest may absolve in the internal forum from every excommunication.[22] But the condition is that the transgressor really repents and makes amends, quitting the activity for which he was censured. If Rev. John Dechet was censured by the Holy See as *excommunicatus vitandus* because he had occupied the Diocese of Banska Bystrica as "administrator" without Church appointment and with the help of the Communist government,[23] he can not be validly absolved from the censure as long as he continues in his illegal function, no matter what the Communists and their fellow-travelers say. Similarly, if Rev. Joseph Plojhar was censured by Archbishop

[21] Cf. Theodoric J. Zubek, O.F.M., "Vatican Radio and the Countries behind the Iron Curtain," *The Jurist*, 1955, pp. 52-64.

[22] Can. 2254, §§ 1-3.

[23] *AAS*, XLII, 1950, p. 195.

Joseph Beran because of his notorious collaboration with the Communists, he can not be validly absolved by Rev. Anthony Stehlik, the intruding vicar capitular of Prague Archdiocese, while he continues his collaboration, no matter what Communist propaganda claims.

The following question was often presented to me: Are all six bishops and the priests who have taken the oath of loyalty to the Communist regime excommunicated as collaborators with Communism? The answer is: Certainly not. To incur an excommunication *latae sententiae*, there must exist transgression of a specific law or precept to which the excommunication is attached. There is no law or precept prohibiting under the penalty of excommunication the taking of the oath of loyalty. To incur excommunication on the basis of collaboration with Communism, some of the delicts specifically enumerated by Canon Law or recent decrees and declarations of the Holy See must have been committed.

During the campaign with their "Catholic Action", in 1949, the Communists in Czecho-Slovakia boasted that they had hundreds of priests supporting that movement. As soon as the bishops and the Holy See took a stand against the schismatic "Catholic Action", practically all priests whose names appeared in this connection, retracted publicly and settled the matter with their Ordinaries.

In subsequent years (1949-1951) the Communists in Czecho-Slovakia used various tricks to take over complete control of the Catholic Church. The "patriotic" priests movement was one of the most important instruments in Communist strategy. Most of the legal leaders of dioceses, bishops and vicars general, were imprisoned and replaced by "patriotic" priests, without a proper canonical appointment. Those priests who gave their helping hand to Communist machinations against the legitimate Church authorities and received Church offices, benefices, and dignities without the proper appointment, no doubt, incurred the canonical censures attached to these transgressions.

Many times I was asked how many excommunicated priests are there in Czecho-Slovakia. There are notorious cases of censures imposed *ab homine*, that is by the Holy See or bishops. At least three priests were censured by the Apostolic See and about ten by their bishops, while the bishops were still relatively free (until

1949). Of about 7,100 Czech and Slovak priests about fifty appear as fervent collaborators with the regime, actively participating in various pro-Communist activities, and taking prominence in the Communist press. Are they excommunicated?

Only in case that the censure was announced by the legitimate Church authority, do we know for a certainty that the penalty was incurred. In all other cases the matter is rather a guess, and only God who searches human hearts and desires can pronounce a definite judgment about a man.

THEODORIC J. ZUBEK, O.F.M., S.T.D.

THE USE OF A "LIE DETECTOR" IN MARRIAGE TRIALS

The thought has often occurred to me, why could not a "lie detector" be useful and even expedient in determining the truthfulness of the parties, particularly in certain difficult cases. Here is my line of reasoning.

Statements and admissions made by the consorts play an important part in marriage causes, particularly those which deal with simulated or conditional consent, with fear or coercion, with the impediment of specific criminality as arising from adultery and attempted marriage, and with abduction.[1] In marriage causes which involve impediments proof of nullity ordinarily is furnished through external facts. But in cases concerning matrimonial consent, the only evidence which is of direct value is that which indicates the actual mind of the parties at the time of the exchange of consent. Thus, in such cases, the confession[2] of the consorts and justifiable presumptions form the chief proofs.[3] Since defective

[1] Cf. Doheny, *Canonical Procedure in Matrimonial Cases*, I, p. 345, n. 6.

[2] The word is here used in its processual sense: a confession in matrimonial trials is understood as any statement or admission, written or oral, of a consort against himself or against the validity of his marriage. Cf. can 1750.

[3] Sanchez, *De Sancto Matrimonii Sacramento Disputationum Libri Decem* (3 vols., Venetiis, 1693), Lib. II, disp. 45, n. 13: "Caetera impedimenta possunt alia via probari, cum externa sint; dissensus autem, cum corde lateat, non potest alia via probari, nisi per conjugum confessionem, licet conjecturae aliae possint adhiberi." Cf. *S.R.R. Dec.*, XIII (1921), 104; 266.

consent is an internal act of the will which is contrary to an external and free act, it is most difficult to prove; indeed, no direct proof, in the strict sense, is possible, since only God can see what is in the mind of a man at a particular moment.

In and of itself, a sworn judicial statement is to be preferred to an unsworn extrajudicial statement;[4] however, the contrary is often true in marriage causes, wherein a substantiated extrajudicial confession, if made *tempore non suspecto*, can well have more probatory value than a judicial deposition.[5]

It is the general rule, therefore, that the judicial depositions of the parties cannot constitute full proof, for a judicial deposition of the consorts is not admissible to constitute proof against the validity of the marriage.[6] However, it is very clear from the jurisprudence of the Rota that the judicial deposition of the parties, while not adequate in themselves to constitute proof against the validity of a marriage, may furnish valuable corroborative evidence which may help in the ascertainment of the entire truth.[7] Indeed, in non consummation cases, when there is no physical proof, often the only real evidence is the testimony of the parties fortified by character testimonials.

The point that I have in mind is that the evidence secured by means of the so-called "lie detector" could, depending upon the circumstances, form part or possibly even all of the external support necessary to form, together with the parties' own depositions, full proof. Let me explain.

[4] *S.R.R. Dec.*, XVII (1925), 35.

[5] *S.R.R. Dec.*, XXXIII (1941), 435: "Confessio vero, quae iam facta est sive ante nuptias sive immediate vel brevi post nuptias, magni immo aliquando maximi momenti est; quo fit ut in hoc casu confessioni extraiudiciali maior vis adiudicanda sit quam confessioni iudiciali."

[6] Art. 117, *Instructio servanda*, S. C. de Sacram.—*AAS*, XXVIII (1936), 313-361. It is to be noted that this article of the Instruction uses the word "proof" in the strict sense of causing conviction in the judge's mind; thus it indicates that the depositions of the parties *can* constitute judicial evidence, for it states that such a deposition "non est apta ad probationem contra valorem matrimonii constituendam." If the deposition of the parties were excluded even as partial proof, article 117 would have to be worded, "non est apta ad probandam nullitatem matrimonii," or in similar words.

[7] Doheny, *op. cit.*, I, 339.

A well known criterion for the evaluation of testimony is the manner in which the deponent acts during the interrogation. This is a most important consideration. Roman law embodied it in the expression, *non testimoniis sed testibus crediturum.*[8] In other words, the emotional behavior of the deponent must be considered in evaluating his statements.[9]

There are many indications of possible untruthfulness on the part of the deponent, such as: a) a defensive smile and a nervous laugh unwarranted by circumstances, but apparently used unconsciously, with a desire to cover deceit; b) avoidance of looking at the judge, except for an occasional quick glance, and keeping the eyes fixed in an unnatural manner on a distant object; c) an almost inaudible voice, indicating a desire possibly to be elsewhere, or trying to cover the mouth or face while testifying; d) repetition of plain and audible questions in what appears to be an unconscious effort to recall testimony and frame a good reply; e) unnecessary and minute accuracy to show that the whole truth is being told; f) repeated avowal of a desire to tell the truth; g) unnatural emphasis on one point with a reluctance to be questioned regarding the source of information and the logical result of premises.[10]

These and many other external signs are indicative of truthfulness or untruthfulness, through a careful observation and analysis of the emotional behavior; however, in emotional behavior many bodily changes occur within the organism that are not directly observable. Postural orientations, facial expressions, gestures, and vocalizations provide some external indications, but even these, because of their dynamic qualities and their relation to other bodily processes, require more detailed examination than casual observation can provide.

According to trained psychologists, external indications are not universally acceptable criteria of emotion, because they are highly susceptible to cultural and social modification and they are admixtures of voluntary and involuntary modes of response. Skin reactions such as blanching, blushing, and sweating provide external signs of a reflexive character in some of the more intense

[8] Cf. D. (22. 5) (3, 1-2-3).

[9] Cf. Reiffenstuel, *Jus Canonicum Universum*, lib. II, tit. XX, nn. 317-340.

[10] Whalen, *The Value of Testimonial Evidence in Matrimonial Procedure*, p. 233.

emotions, but only sweating (galvanic skin response) can be used very adequately as an index of mild emotional responsiveness. Although the overt signs of emotion are utilized daily in social adjustments and personal evaluations, it is difficult to be sure just what aspects of the various expressive changes constitute the basis of prediction.[11]

Emotion, therefore, is characterized by many combinations of bodily change. There are overt manifestations that are readily observable, and there are organic and physiological changes that are revealed only by special procedures and recording devices. What is of special interest to us is that these less observable organic and physiological changes are not subject to very much voluntary control, and therefore should be accurate, objective indications of the fact that there *is* some emotional response. Naturally, the response in itself means nothing unless correlated with responses in an over-all situation. Thus, in seeking to derive knowledge of one's truthfulness by way of instrumentally measuring emotional response, pertinent questions are interspersed among apparently indifferent or even meaningless questions. It will be by a comparison of the emotional responses during this type of questioning that a pretty accurate conclusion of the deponent's truthfulness can be arrived at.

The various types of apparatus designed to measure disturbances in the involuntary emotional responses, which take place during an examination, chiefly concern breathing, blood pressure, and electrodermal changes. Instruments of this sort are popularly referred to as "lie detectors"—a misnomer, since the instruments do not detect lying, but rather emotional response; the judgment of whether the party being questioned is lying must be made by a trained observer. An examiner may use a number of devices for measuring psychophysiological activity and he concludes that the person is or is not telling the truth from an analysis of the records obtained with the apparatus.

The technique for recording breathing employs a pneumograph about the chest of the one being questioned. This is a large rubber tube with a light spiral spring inside to keep it from collapsing.

[11] Lindsley, *Emotions, Handbook of Experimental Psychology* (edited by S. S. Stevens, New York, Wiley & Sons: 1951), p. 473.

The arrangement is air-tight. A nipple on one end is connected through a rubber tube to a tambour or metal bellows recording on a polygraph.[12]

Detailed mathematical analysis of the results of a pneumograph are time-consuming, and often the breathing record is merely inspected for irregularities during crucial questions in comparison with control questions.

Blood pressure is another bodily accompaniment of emotions that is measured instrumentally to detect lying. In this technique, a standard sphygmomanometer is used: a rubber sleeve, which is wrapped around the arm above the elbow, is inflated until circulation in the lower arm is stopped. Then a valve is opened to produce a slow leak in the sleeve, thus reducing the pressure gradually until the blood circulates in the forearm. The first pulse beats are noted by means of a stethoscope placed just below the elbow at the bifurcation of the artery or by feeling the pulse at the wrist. At that moment the examiner reads a manometer which indicates the pressure in the sleeve.[13]

It was soon apparent that with this technique a good deal was lost between the blood pressure readings, since it is not possible to take a reading more than once a minute without considerable discomfort; a person could lie between readings and recover from the excitement by the time the next reading was taken. Many examiners, therefore, have accepted a compromise and record what is known as *relative blood pressure*. The rubber sleeve or cuff is inflated to a level above diastolic pressure, but where it is not uncomfortable and does not occlude circulation. Variations in pressure from this level are recorded continuously. The significance of these changes is not always apparent in terms of absolute pressures,

[12] Cf. Burt, *Examination of Offenders, Handbook of Applied Psychology*, (edit. Fryer & Henry, 2 vols., New York: Rinehart & Co., 1950), II, p. 557.

[13] Burt, *op. cit.*, p. 558. There are two measures of blood pressure, systolic and diastolic, and the difference between them is known as pulse pressure. Systolic pressure is the maximal pressure reached during the contraction of the heart; diastolic pressure is the least pressure during expansion. The diastolic pressure is more important in diagnosing hypertension and high blood pressure, since it is influenced more by the actual condition of the arteries; the systolic pressure is more important in diagnosing emotional reaction, since it depends more on the functioning of the heart muscle, which in turn is influenced by its nervous supply.

but the relative pressures can be correlated with other happenings during the course of an examination.[14]

One of the most popular measures of autonomic activity associated with affective and emotional states is the *galvanic skin response*. This phenomenon is known by various other terms such as psychogalvanic reflex, skin resistance, palmar resistance, palmar conductance, electrodermal response, and skin potential. They are all related to sweating, the effector mechanism for which is the sweat gland membranes, activated by the sympathetic nervous system.

There are two ways of measuring emotional response in connection with the skin. The first method measures resistance of the skin to a current externally applied, and for this reason is called the *exosomatic* method. It consists of connecting electrodes at two points on the bodily surface, sending an extremely weak and imperceptible electric current through the individual; an appropriate circuit connects with a galvanometer which deflects as minute changes in bodily resistance occur. Electrical resistance is more responsive to emotional stimuli of a sensory character, such as being startled by a sound, whereas the blood pressure is more responsive to stimuli involving association, i.e., some intellectual aspect, such as deception.[15]

The second method connected with the skin is the measurement of skin potential change arising from currents in the skin; this method is called an *endosomatic* method, and is less frequently used. Measurements in this technique are taken through amplifiers of high input impedance.[16]

In civil courts, up to the present time there have been very few instances where expert testimony along these lines has been admitted as evidence. Nevertheless, the use of so-called "lie detectors" is increasing, and has proved quite successful in the preliminary examination of suspects.

It seems to me that the ecclesiastical judge would have the discretionary authority to admit evidence secured by means of a "lie detector", at least as supporting evidence. Naturally, the

[14] Cf. Lindsley, *op. cit.*, p. 476.

[15] Burt, *op. cit.*, p. 560.

[16] Cf. Lindsley, *op. cit.*, p. 474.

instruments must be handled by experts; and it would be in this capacity that the judge could admit the use of such apparatus.[17] In fact, it would probably be a good idea to have a priest member of the tribunal trained to operate such equipment.

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EVOLUTION OF THE JURIDICAL FORM OF MARRIAGE IN THE LATIN RITE *

The sacrament of matrimony is unique in that it is administered not by a priest or bishop but by the contracting parties themselves who administer the sacrament to each other. It was indubitably a desire to preserve this doctrine which prevented the Church for fifteen hundred years from enacting a law which would require the presence of a priest for the validity of marriage. The Church recognized the principle that "consent makes marriage" and contented herself with strong exhortations to the faithful that they contract marriage in the presence of witnesses and receive the blessing of the priest. Clandestine marriages were condemned but they were not rendered invalid by a law of the Church until the enactment of the *Tametsi* decree in the Twenty-Fourth Session of the Council of Trent, held during the Pontificate of Pius IV on November 11, 1563. When the final vote was taken on the *Tametsi* decree establishing a juridical form of marriage *for validity*, fifty-six of the Fathers of the Council of Trent voted against it, one hundred and thirty-five voted for it and nine either cast no vote or simply deferred to the judgment of the Holy See.[1]

[17] Cf. can. 1792.

* Address delivered by the Right Reverend Josiah G. Chatham, S.T.L., J.C.D., Officialis, Diocese of Natchez, at the seventeenth annual National Meeting of The Canon Law Society of America held October 25-26, 1955, at Hotel Hershey, Hershey, Pennsylvania.

[1] Carberry, *The Juridical Form of Marriage*, The Catholic University of America Canon Law Studies, n. 84 (Washington, D. C.: The Catholic University of America, 1934), p. 23; Boudreaux, *The "ab acatholicis nati" of Canon 1099 § 2*, The Catholic University of America Canon Law Studies, n. 227 (Washington, D. C.: The Catholic University of America Press, 1946), pp. 1-2.

The Fathers labored to make it clear that they were not touching upon the question of the intrinsic matter or form of the sacrament. They were setting up a new impediment, the impediment of clandestinity.

The *Tametsi* decree provided as follows:

> Although it is not to be doubted that clandestine marriages made with the free consent of the contracting parties are valid and true marriages so long as the Church has not declared them invalid,[2] and consequently that those persons are justly to be condemned, as the holy council does condemn them with anathema, who deny that they are true and valid, and those who falsely assert that marriages contracted by children (minors) without the consent of the parents are invalid, nevertheless the holy Church of God has for very just reasons at all times detested and forbidden them.[3]

It is clear that up to this point of the decree, the Council is simply stating that " consent makes marriage ". Then the Council goes on to give the reasons why a law requiring a juridical form for the validity of marriage is necessary:

> But while the holy council recognizes that by reason of man's disobedience those prohibitions are no longer of any avail, and considers the grave sins which arise from clandestine marriages, especially the sins of those who continue in the state of damnation, when having left the first wife with whom they contracted secretly, they publicly marry another and live with her in continual adultery, and since the Church which does not judge what is hidden, cannot correct this evil unless a more efficacious remedy is applied, therefore, following in the footsteps of the holy Lateran Council celebrated under Innocent III,[4] it commands that in the future, before a marriage is contracted, the proper pastor of the contracting parties shall publicly announce three times in the Church, during the celebration of the Mass on three successive festival days, between whom marriage is to be contracted . . . .[5]

Thus the council explains the *ratio canonica* for the enactment it is about to make. Up to this time the validity or invalidity of a given marriage could easily be *a secret* known only to the parties themselves. The judicial power of the Church was ren-

[2] C. 2, X, *de cland. desp.*, IV, 3.

[3] C. 3, XXX, q. 5; c. 13, C. XXXII, q. 2; c. 2, C. XXXV, q. 6; c. 3, X, *qui matr. accus. poss.*, IV, 18. Schroeder, *Canons and Decrees of the Council of Trent* (St. Louis and London: B. Herder Book Co., 1941), p. 183—hereafter cited simply by name of the author.

[4] C. 3, X, *de cland. desp.*, IV, 3.

[5] Schroeder, *loc. cit.*

dered ineffectual. The abuse had pernicious spiritual and social repercussions. To correct these evils the Council first required the announcing of the banns and laid down a liturgical form for the celebration of marriage. These provisions, however, are not yet expressed in the form of an invalidating law:

> . . . after which publications, if no legitimate impediment is revealed, the marriage may be proceeded with in the presence of the people, where the parish priest, after having questioned the man and the woman and heard their mutual consent, shall either say: "I join you together in matrimony, in the name of the Father, and of the Son, and of the Holy Ghost," or he may use other words, according to the accepted rite of each province.[6]

Then having made provision for dispensing with the banns under certain circumstances, the council set up a juridical form of marriage which was required *for validity:*

> Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorized by the parish priest or by the ordinary and in the presence of two or three witnesses, the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null, as by the present decree it invalidates and annuls them.[7]

The decree then instructs ordinaries to punish priests or witnesses who violate the decree. It exhorts the newly married couple to receive the priestly blessing in the Church. It rules that only the parish priest of one of the contracting parties can give the blessing, and that only the parish priest or ordinary of one of the parties can grant permission to another priest to impart the blessing. An *ipso iure* suspension was established against priests who attempted to unite in marriage persons of another parish, without permission of the proper pastor. Provision was made for the recording of marriages. The contracting parties were exhorted to go to confession and to receive the Holy Eucharist. Finally, the council provided for the promulgation of the decree—and it was especially this provision which deprived the law of much of its desired effect and gave rise to innumerable new difficulties:

> And that these so salutary regulations may not remain unknown to anyone, it commands all ordinaries that they as soon as possible see to it that this decree be published and explained to the people in all the

[6] Schroeder, pp. 183-184.

[7] Schroeder, p. 184.

parish churches of their dioceses, and that this be done very often during the first year and after that as often as they deem it advisable. It decrees, moreover, that this decree shall begin to take effect in every parish at the expiration of thirty days, to be reckoned from the day of its first publication in that church.[8]

The *Tametsi* had several shortcomings as effective legislation. The pastor whose presence was required for validity was the pastor of the domicile of one of the contracting parties and frequently, under the law as it prevailed at the time, it was difficult to determine one's domicile. In an effort to overcome this difficulty the custom arose of all pastors of a given diocese delegating all other priests of the diocese to assist at marriages of their parishioners. This was possible, for the *Tametsi* did not require express delegation to a particular priest for a particular marriage. A still greater difficulty arose out of the requirement of promulgation from parish to parish. If the *Tametsi* had been promulgated in the parish where a person had domicile—then, though that person moved to a parish where the decree had not been published, he nevertheless remained bound by the decree. Jurisprudence developed the idea that promulgation and abrogation of the decree could be effected by custom—and this added further to the confusion. A final problem was that no exemption was provided for heretics. The Council of Trent possibly envisaged a situation in which Catholics and the Innovators would live separately in defined communities or parishes, and that heretics would be exempted through lack of promulgation of the decree in the places where they lived. However, circumstances did not always develop in this fashion, and this no doubt gave rise to the idea, which still prevails in the minds of many Protestants, that the Catholic Church considers all marriages of non-Catholics to be invalid.

On November 4, 1741, Benedict XIV, in his Declaration "*Matrimonia quae in locis*", exempted heretics from the juridical form of marriage.[9]

The Benedictine Declaration was originally issued for Belgium and Holland, but was later extended to other parts of the world

[8] Schroeder, p. 185.

[9] Denziger, *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum* (Friburgi Brisgoviae: Herder and Co., editio 18-20, 1932), nn. 1452-1457—hereafter cited D.

and affected places where the *Tametsi* had been promulgated. In making this Declaration, the Holy Father made specific reference to the widespread doubts and anxieties which troubled bishops, pastors and missionaries concerning the validity of non-Catholic and mixed marriages.[10]

The *Tametsi* had made no exception in favor of heretics. According to the letter of the law, therefore, they were bound to the Tridentine form of marriage. Yet, by his reference to the doubts and anxieties of bishops, pastors and missionaries, Benedict XIV seemed to imply that the opinion, which held that heretics were exempt from the form in virtue of canonical equity, was not entirely devoid of foundation. The Benedictine Declaration settled the problem. Heretics were exempted from the juridical form of marriage when they married heretics.[11]

As far as validity was concerned, they were also exempt from the juridical form when they married Catholics. Such marriages were condemned as being illicit, but past and future marriages of heretics with Catholics, contracted without juridical form, were held to be valid. This sanctioned the application of the principle of the communication of privilege:

> At si forte aliquod huius generis matrimonia, Tridentini forma non servata, ibidem contractum iam sit, aut in posterum (quod Deus avertat) contrahi contingat, declarat Sanctitas Sua, matrimonium, huiusmodi, alio non occurrente canonico impedimento, validum habendum esse . . . .[12]

Under the terms of the Benedictine Declaration: 1. When a Catholic married a baptized non-Catholic, they *were not* bound to the form; 2. When a baptized non-Catholic married a baptized non-Catholic they *were not* bound to the form. These were the two exceptions to the *Tametsi* established by the Declaration.

The exceptions did not obtain in instances in which one party was unbaptized. Therefore: 1. When a Catholic married an unbaptized person, they were bound to the form; 2. When a baptized non-Catholic married an unbaptized person, they were bound to the form. In these two cases, therefore, a marriage attempted without the presence of the proper priest and two witnesses was in-

[10] D. 1452.

[11] D. 1454.

[12] D. 1455.

valid both because of *defect of form* and because of *disparity of cult.*

On April 6, 1859 in a response to the Bishop of Haarlem, Holland, the Holy Office recognized an extension of the exemptions established by the Benedictine Declaration to include certain persons who had been baptized in the Catholic Church.[13]

Under the terms of this response, baptized Catholics who, from a time prior to the age of seven years, had been reared in heresy, were classed as heretics and thus recognized as being exempt from the juridical form of marriage. The same exemption was recognized as extending to baptized Catholics who were educated by heretics, or who had fallen under the influence of heretics in childhood and joined a heretical sect. Apostates from the Catholic Church who affiliated with a heretical sect were recognized as being exempt from the form of marriage.

On January 18, 1906, Pius X extended the *Tametsi* to the entire German Empire, but, at the same time, he exempted all heretics from the form of marriage, and recognized the application of the principle of the communication of this privilege when they married Catholics.[14]

The exemptions here granted were not affected by the *Ne Temere* of 1908 and were operative in Germany, and later in Hungary, until the effective date of the Code of Canon Law.

As indicated above, the *Tametsi* decree of the Council of Trent became effective only in terms of a parochial promulgation. This was considered the greatest weakness of the law. It has also been seen that it failed to provide an exemption for heretics. Such an exemption, however, as we have seen, was made by the Benedictine Declaration and was extended by other provisions which the Holy See made for particular territories. On Aug. 2, 1907, through the Sacred Congregation of the Council, Pius X issued the *Ne temere* decree which became effective on Easter Sunday, April 19, 1908.[15]

[13] S. C. S. Off. (*ad Ep. Harlemen.*), 6 apr., 1859—*Codicis Juris Canonici Fontes cura Emi. Petri Cardinalis Gasparri editi* (Romae: Typis Polyglottis Vaticanis, 1923-1939), n. 950; Cf. Boudreaux, *op. cit.*, pp. 8-9.

[14] Pius X, *Provida sapientique*, 18 Jan. 1906—D. 1991-1994.

[15] D. 2066-2070.

By this decree:

1. All Latin Rite Catholics of the entire world were bound to the juridical form of marriage when they married Catholics;
2. Non-Catholics were exempted when they married among themselves.
3. The "communication of privilege" admitted by the Benedictine Declaration was abolished and Catholics were bound to the form when they married non-Catholics (except in Germany and Austria).
4. The juridical form required the presence of the local Ordinary or pastor, or a priest delegated by either. The local Ordinary or pastor or lawful delegate could validly assist at all marriages within the territorial limits of their respective jurisdictions. Passive assistance was tolerated. The presence of at least two other witnesses was required.
5. In imminent danger of death, if neither the local Ordinary or pastor or a delegate of one of these could be had, for the sake of conscience or the legitimation of offspring, marriage could be contracted validly before any priest and two witnesses.
6. In places where the local Ordinary, pastor or delegate could not be had, and this condition had existed for a month ("*eaque rerum conditio a mense iam perseveret*") marriage could be contracted before two witnesses (without the presence of a priest).

From this it can be seen that the provisions of the *Ne temere* were substantially the same as those adopted by the Code of Canon Law. The *Ne temere* made no exception for persons who had been baptized in the Catholic Church but who later lost their identification with the Church. Can. 1099 § 2 of the Code was to alter this by a special provision for the "*ab acatholicis nati*". In the meantime, however, canonists had in mind the response of the Holy Office to the Bishop of Haarlem (Apr. 6, 1859),[16] and there was some discussion about the status of persons who were born of non-Catholic parents, baptized in the Catholic Church, but reared in a non-Catholic way of life. On March 31, 1911 the Holy Office decreed that recourse was to be had to the Holy See in each individual case in which the marriage of such persons was questioned on the basis of defect of form.[17]

And thus, in summary form, we see the development of the law of the Church concerning the juridical form of marriage, from the beginning down to the effective date of the Code of Canon Law, May 19, 1918. It is an interesting history that shows the solici-

[16] Cf. note 13 above.

[17] *Acta Apostolicae Sedis, Commentarium Officiale* (Romae, 1909–), III (1911), 163-164—hereafter referred to as *AAS*; Cf. Boudreaux, *op. cit.*, p. 12.

tude of the Church for the sacredness of marriage. In the ages of faith, when there was comparative unity in the external life of Christendom, the emphasis was on the validity of marriage as it affected the life and conscience of the individual Christian. With the disruption of Christian unity a juridical form was required for the validity of marriage, thus making it possible for the Church to pass effective judgment upon the marital status of her children. The provisions of the Code of Canon Law represent a summary of the experience of two thousand years, and demonstrate the ability of the Church to adapt her laws to the changing circumstances of the times.

In the remaining paragraphs of this article the provisions of the Code and its subsequent modifications will be briefly reviewed.

The juridical form of marriage as prescribed by the Code of Canon Law [18] went into effect, as mentioned above, on May 19, 1918. Chapter VI of Title VII, Book III is entitled "*De forma celebrationis matrimonii*". Canons 1094-1099 deal with the juridical form of marriage, which is the subject of this paper. Canons 1100-1102 treat of the liturgical form of marriage. Canon 1103 provides for the recording of marriages. The form as prescribed by the Code is binding upon all Catholics of the Latin Rite throughout the world.[19]

Canon 1094 is a general canon subject to closer specification in the canons which follow. It requires, for the validity of marriage, the presence of the pastor or Ordinary of the place, or a priest delegated by either of these, and at least two other witnesses. No special qualities are required in the witnesses. It is perfectly clear, however, that a witness must have the use of reason and be able to testify that a certain marriage took place.

The first paragraph of Canon 1095 specifies the circumstances under which the pastor or Ordinary of the place can validly assist at a marriage, namely:

[18] *Codex Juris Canonici Pii X Pontificis Maximi jussu digestus Benedicti XV auctoritate promulgatus, Praefatione, Fontium Annotatione et Indice Analytico-Alphabetico ab Emo. Petro Card. Gasparri Auctus* (Romae: Typis Polyglottis Vaticanis, 1917; Reimpressio, 1934).

[19] Carberry's dissertation to which reference is made above (note 1) gives an excellent commentary on Canons 1094-1099.

1. From the day of canonical possession of his benefice or entry upon office, unless he be under sentence or declaration of excommunication, interdict or suspension from office;

2. Within the confines of his territory;

3. So long as he is not compelled to ask and receive the consent of the parties by force or grave fear.

The second paragraph of Canon 1095 authorizes the pastor or Ordinary of the place to delegate another priest to assist validly at a marriage within the limits of the territory of the delegator. The word *licentia* used in this canon clearly has the meaning of *delegatio.*

In assisting at a marriage the priest does not exercise jurisdiction in the proper sense of the word. The authors have agreed, however, that this assistance and the delegation of the faculty to assist follow the general canonical provisions which regulate the use and delegation of jurisdiction. A particular question in point was whether or not the Church would supply the necessary authority to a priest who lacked proper delegation in cases of common error and in cases of positive and probable doubt of fact or of law (Canon 209). On March 26, 1952 the Pontifical Commission for the Authentic Interpretation of the Code answered this question *in the affirmative.*[20] The Church does supply in such cases.

The particular rules governing delegation to assist at marriages are given in Canon 1096 § 1. The delegation must be expressly given to a determined priest for a determined marriage. General delegations are ruled out except in the case of parochial assistants for the parish to which they have been assigned. Violation of any of these rules renders the delegation invalid. The second paragraph of the Canon admonishes the pastor or Ordinary to establish the free state of the parties, according to the provisions of the Canons, before granting delegation to another priest to assist at a marriage.

Canon 1097, § 1 stipulates that the pastor or Ordinary *licitly* assists at a marriage only:

1. After he has established the freedom of the parties according to the norms of canon law;

[20] *AAS*, XLIV (1952), 497—Bouscaren, *Canon Law Digest* (Milwaukee: Bruce, 1954), Vol. III, p. 76.

2. After he has established the fact that one of the contracting parties has domicile or quasi-domicile or a month's residence or (in the case of persons who have no domicile or quasi-domicile) actual residence in the place where the marriage will be contracted;

3. After having obtained the permission of the pastor or Ordinary of the place where one of the contracting parties has domicile or quasi-domicile or a month's residence. This permission is not required if the contracting party has no domicile or quasi-domicile or place of residence. Serious necessity also excuses the pastor or Ordinary from requesting this permission.

Canon 1097 § 2 establishes the general rule that, when both parties to a marriage are Catholics of the Latin Rite, the marriage should take place in the presence of the pastor of the bride. A just cause excuses from this general rule. If the contracting parties are Catholics of different Rites, the case will be governed by particular law if such law is in force—otherwise the marriage will take place in the Rite of the groom and in the presence of his pastor. The wording of this paragraph of Canon 1097 seems to indicate that the legislator is treating only of marriages in which both parties are Catholics. If one party is Catholic and the other non-Catholic, the pastor will be governed by diocesan statute if such exists—otherwise the pastor of either party may assist at the marriage.

Canon 1098 provides an "extraordinary form of marriage" for certain unusual cases.[21] In cases in which the pastor or Ordinary or a priest with proper delegation cannot be had or approached without serious inconvenience either to the priest or to the contracting parties, marriage can be contracted validly and licitly *coram solis testibus:* 1. In danger of death; 2. Outside danger of death if it is prudently foreseen that these conditions will continue for a month. Under these circumstances, if some other priest is available he must be called to assist at the marriage together with the other witnesses, but his presence is not required for validity.

In reference to the unavailability of the pastor or Ordinary, the

[21] Cf. Fus, *The Extrcordinary Form of Marriage According to Canon 1098*, The Catholic University of America Canon Law Studies, n. 348 (Washington, D. C.: The Catholic University of America Press, 1954).

Ne Temere[22] placed the qualification: "*eaque rerum conditio a mense iam perseveret.*" The Code substitutes the norm: "*dummodo prudenter praevideatur eam rerum conditionem esse per mensem duraturam*". It could probably be disputed which phraseology is the more practical. At any rate, under the law of the Code, a very practical problem is the *terminus a quo* of the one month. Fus[23] attempts a solution as follows: "In computing the period of a month's duration in regard to the unavailability of a qualified priest, the initial day (*dies a quo*) is the day when everything is prepared for the marriage (*omnia parata sunt ad nuptias*)." The difficulty with the solution is that neither of the parties is likely to be a canon lawyer. However, the present writer can think of no better solution.

Finally Canon 1099 specifies who is bound and who is not bound to the juridical form of marriage. The application of this canon to particular cases involves problems too complex to be discussed in a paper of limited scope. The reader is referred, for a discussion of these, to the valuable works of Carberry, Boudreaux, Fus and other commentators.

The provisions of Canon 1099 may be summarized as follows:

1. All persons baptized in or converted to the Catholic Church, even though they later fall away, *are bound to the form* when they marry:

   A. Persons who are likewise baptized in or converted to the Catholic Church;

   B. Persons who are non-Catholics, whether baptized or not.

2. Orientals, even prior to the enactment of the Oriental Canons requiring a juridical form for validity, were and are bound to the form when contracting marriage with Catholics of the Latin Rite.

3. Non-Catholics who had not been baptized in or converted to the Catholic Church *are never bound* to the form *when they marry other non-Catholics.* This exemption applies both to baptized non-Catholics and to the unbaptized.

4. Until January 1, 1949, non-Catholics who had been baptized in the Catholic Church were exempted from the form of marriage:

[22] D. 2069.

[23] *Op. cit.*, p. 114.

A. If they were born of non-Catholic parents, that is, if at least one parent was a non-Catholic,[24] and
B. If *ab infantili aetate* they were raised in heresy or schism or infidelity or without any religion,[25] and
C. They married persons who, like themselves, were not bound to the form of marriage.

On August 1, 1948 Pope Pius XII eliminated the exemption afforded the *ab acatholicis nati,* and directed that the latter part of Canon 1099 § 2 be stricken from the Code, beginning with the words: "*item ab acatholicis nati.*" This ruling was to be effective from January 1, 1949 and represents the last change made by the Holy See relative to the juridical form of marriage as required for validity in the Latin Rite.[26]

Therefore, since January 1, 1949, all persons of the Latin Rite, without exception, baptized in or converted to the Catholic Church, are bound to the juridical form of marriage.

PAST AND PRESENT PRACTICE IN THE SELECTION OF CANDIDATES FOR BISHOPRICS IN THE U. S.

An Outline

Throughout the course of the Church's history, the candidates or nominees for the episcopal office have been presented for the consideration of the Holy See in varied ways. It would be interesting to examine the divers means utilized by the Church to bring to light the able, prudent and holy men who were, at least according to the best human judgment, most fitted for this all-important and burdensome office. Of equal interest, however, is the scope of this paper,—a review of the laws, customs and practices which determined the manner of selecting those of the American clergy who were adjudged "episcopal timber" worthy of the consideration of the Apostolic See.

[24] *AAS*, XXI (1929), 573—Boudreaux, *op. cit.*, p. 17.

[25] Boudreaux, *op. cit.*, gives what is almost certainly the best and most detailed discussion of this point.

[26] *AAS*, XL (1948), 305—Bouscaren, *Canon Law Digest*, Vol. III (1954), pp. 463-464.

Norms for determining the worthiness of nominees for the episcopacy were amply provided by the Council of Trent, and by the apostolic letters and constitutions of Popes Benedict XIV, Pius IX, and Pius X, but the practical and ultimate norm has been the considered recommendations of the hierarchy of the province or territory concerned,—all of which is implied in the brief statement of canon 330 of the present law.

In these United States, the history of the selection of candidates for the episcopacy actually began with the year 1788. For background material, however, one might go back to the year 1784.

On June 9, 1784, John Carroll was appointed prefect apostolic of the Thirteen States of North America. Although the appointment of Carroll, as prefect apostolic, met with the approval of the major portion of the American clergy, who feared the establishment of a hierarchy which might be selected and dominated by foreign elements, the restrictions and instability of his office rankled Carroll himself. The difficulties of his administration justified Carroll's worst fears, and caused him to complain bitterly against the arrangement which failed firmly to implant him as the unquestioned superior in the minds of the obstinate members of the clergy. But the strong sentiments of the priests, as voiced in a letter by Carroll himself [1] and strongly asserted by the clergy themselves when informed of Carroll's appointment as prefect apostolic,[2] caused the Sacred Congregation for the Propagation of the Faith to postpone the thought of designating a bishop as the head of the American Church.

In 1788, however, the very obstinacy of some of the clergy demanded the immediate establishment of the episcopacy on American soil. It was suggested by the Holy See that a vicar apostolic, graced with the office of bishop, should be appointed over

[1] ". . . it will never be suffered that their [the Catholics of the Thirteen States] ecclesiastical superior (be he bishop or prefect-apostolic) receive his appointment from a foreign State, and only hold it at the discretion of a foreign tribunal or congregation."—T. Roemer, *The Catholic Church in the United States* (St. Louis, London: B. Herder Book Co., 1950), p. 90.

[2] They declared that no bishop was necessary and " that if one be sent, it is decided by the majority of the Chapter [of the delegates of the Select Body of clergy, meeting at Whitemarsh, October 1, 1784] that he shall not be entitled to any support from the present estates of the clergy."—Roemer, p. 89.

the American Church. Carroll was to be designated unless the circumstances warranted a voice of the clergy.

Consequently, with the approval of the Sacred Congregation for the Propagation of the Faith, 29 electors from the clergy met at Whitemarsh, on March 25, 1789, and cast their ballots to establish their recommendation for America's first bishop. John Carroll was designated with 24 votes.

The Holy See immediately approved the recommendation of the priests of America, and, moreover, Pius VI, in the Brief *Ex hac apostolicae* of November 6, 1789, acted upon the suggestion of the clergy and established a diocese, with Baltimore the see city, in lieu of the proposed vicariate apostolic. The first bishop, then, was selected by the American clergy by special provision of the Holy See.

In 1793, in proposing the appointment of a coadjutor bishop as a counter-suggestion to Carroll's plea for the establishment of a new diocese for the better service of the growing Catholic population, the Sacred Congregation for the Propagation of the Faith ordered that the nomination or recommendation of a suitable candidate be arrived at by the vote of the clergy under Carroll's jurisdiction. The clergy's choice, Lawrence Graessel, was confirmed by the Congregation and approved by the Roman Pontiff in December of that same year. Graessel, however, died before his appointment was officially made in Rome, and eventually the Holy See ordered the presentation of a new recommendation—again to be determined by the vote of the clergy. Leonard Neale was nominated, and officially approved in April of 1795.

In 1802, the Sacred Congregation, when realizing the awesome extent of the American territories, asked Carroll to offer a plan for the division of the land into new dioceses and the establishment of Baltimore as an archdiocesan see. It seems that Carroll was asked to suggest suitable candidates for these proposed sees.[3] Although Carroll consulted with the clergy of his diocese regarding the territorial extent of the new dioceses, he himself suggested Cheverus for Boston, Egan for Philadelphia and four candidates for Bardstown, namely Stephen Badin, Charles Nerinckx, Joseph Flaget, and Thomas Wilson. The Congregation accepted Carroll's recommendations, singling out Flaget for the Bardstown see, and

[3] Roemer, p. 136.

also appointed Richard Concanen for New York. Carroll had offered no candidate for this new diocese, but the Holy See chose Concanen, Carroll's Roman agent, as one acceptable to Bishop Carroll and well acquainted with American ecclesiastical affairs.

The newly consecrated bishops (three of the four named) met with Bishop Carroll in Baltimore in 1810, and petitioned the Holy See for permission to nominate the candidates for any sees which became vacant in the future.[4]

After the death of Egan, in 1814, the bishops exercised this prerogative, and presented the names of candidates to the Sacred Congregation, but they were thwarted by the unwillingness of the nominees, until ultimately Henry Conwell, a candidate of the hierarchy of Ireland, was appointed by Rome (1820). The need for the judicious deliberations and recommendations of the American hierarchy was emphasized by the appointment of Conwell; 74 years of age when appointed, he was unfamiliar with the ramifications of diocesan administration in Philadelphia, and was unable to cope with the problems of the new Church, especially in regard to the explosive trustee difficulties. Eventually he had to be deprived of his jurisdiction because of his senility and consequent maladministration.

Although Bishop England was a fortunate example of an episcopal appointee selected by the Holy See without the consultation or the counsel of American bishops, he agitated for the cooperative counsel of the Archbishop and his suffragans in the nomination of priests for the episcopacy. Of major concern to the American hierarchy was the undue influence exercised by foreign Churchmen, especially the Irish hierarchy, as evidenced in the appointment of their own men to American sees; of particular concern to Bishop England was the fact that too often the filling of a vacant diocese depended entirely upon the singular discretion of the reigning Archbishop. It was due primarily to the pressure exerted by England that Whitfield called the first and second Provincial Councils.

In the fourth decree of the Second Provincial Council, held in 1833, there was outlined the proposed manner of selecting candidates for vacant sees and coadjutorships.

[4] P. Guilday, *A History of the Councils of Baltimore* (New York: MacMillan, 1932), pp. 72-77.

The Fathers of the Council were in agreement that all the bishops of the province (which included all of the federated States until the establishment of a new provincial see), on the occasion of the provincial councils, should propose and discuss among themselves those priests who possessed the requisite qualifications for the episcopacy, and whose names might then be submitted to the Holy See for consideration whenever a vacancy occurred. From these same would be drawn the men chosen as coadjutors to any see.

To provide against the problem posed by a vacancy when there was no immediate prospect of a Council, each bishop was to record the names of three candidates whom he considered qualified for the episcopal see, and file these names, in a sealed and properly marked letter, so that they might be submitted by the Vicar General, in the case of the bishop's death, to the Archbishop and (a second copy) to the neighboring residential bishop, or to the senior of the neighboring bishops. The bishop receiving the submitted names was to write to the Archbishop, presenting his animadversions. If the neighboring bishop failed in this, the Archbishop was then to write to all the bishops, excepting none, presenting the names and his own *votum* for their consideration. He could also add other names if the proposed candidates were felt to be inadequate. All the bishops were then to write to the Sacred Congregation, submitting their vote on the three (not more than six) candidates proposed.

If the metropolitan see was vacant, the Vicar General of the recently deceased bishop was to send the previously prepared list of candidates to the senior suffragan, who was to act in lieu of the Archbishop, in the manner proposed above.

If no names were to be found in the files or among the effects of the deceased bishop, then the Vicar General was to notify the nearest suffragan, or the senior of those bishops who resided in the neighboring dioceses, so that the suffragan might present three candidates to the Archbishop and the other suffragans. If this bishop failed in this office, then the Archbishop was to submit three names for the consideration of all the Ordinaries of the dioceses of his province, who in turn were to write to the Holy See.

It may also be noted here that the Fathers of the Second Provincial Council were in accord in affirming that no bishop should be given a coadjutor against his will unless, in the judgment of the council of bishops and of the Holy See, it was decided that he was

unable to govern his see. The coadjutor, however, was to be chosen by the Ordinary with the assenting votes of the college of the bishops. For this end, the bishop desiring the coadjutor was to submit three names for the consideration of the others and to the Holy See.

In the event that the Council was to meet within three months after the death of a bishop, the Fathers were to discuss the nominees before writing to the Sacred Congregation.[5]

The norms proposed by the Fathers of the Second Provincial Council were substantially accepted by Rome, in 1834, when the Congregation agreed that the Archbishop was not to act alone, but was to consult his suffragans in nominating prospects for the consideration of the Holy See. In the event that the bishops were unable to meet in a body soon after the death of the incumbent of an episcopal office, the proposed candidates could be suggested by the bishops most concerned with the affairs of the vacant diocese, although the others were not excluded from any deliberations or from submitting names to the Holy See.

In the years which followed, the Holy See generally depended upon the recommendations of the body of bishops not only for the proposal of likely candidates, but also for the erection and division of dioceses and provinces. There were, however, some notable exceptions, as for example in the establishment of the province of Oregon City in 1846.

In 1850, the Sacred Congregation for the Propagation of the Faith required that the metropolitans of the American archdioceses submit to one another the names of those who had been recommended for the episcopacy; the metropolitans, in turn, were to send their observations on the candidates to the Holy See.[6]

In 1859 it was also decreed that all the archbishops were to be afforded a deliberative vote in the selection of an ordinary for any metropolitan see.

Two years later, in 1861, the Sacred Congregation instructed each bishop to submit, every three years, the names of those priests whom they considered fitted for the episcopacy.[7]

5. Decreta Concilii Provinciae Baltimorensis II (1833), decretum IV—*Acta et Decreta Sacrorum Conciliorum Recentiorum, Collectio Lacensis,* III, 41.

6 Guilday, *A History of the Councils of Baltimore,* p. 205.

7 Guilday, *A History of the Councils of Baltimore,* p. 206.

The previously established norms and the decrees and decisions of the Holy See were essentially reiterated in the decrees of the Second Plenary Council of Baltimore.

Incorporating in full the text of the decree of 1834, submitted to the American hierarchy by the Congregation in response to the proposals of the Second Provincial Council, the Fathers of the Second Plenary Council noted that, while the previously established norms and laws were still to be observed, the following were also to be strictly obeyed:

I. All the bishops, every three years, were to submit the names of candidates for the episcopacy both to the Metropolitan and to the Congregation for the Propagation of the Faith.

II. The bishops were to make certain of the presence of the necessary qualifications in those whose names they submitted.

III. When any episcopal or metropolitan see become vacant, the bishops were to meet in synod or special council to discuss those who seemed likely candidates.

IV. Before meeting to discuss nominees for vacant sees, the bishops were to submit their individual recommendations to the metropolitan or to the senior suffragan.

V. The qualities of the nominees were to be publicly discussed in the meeting of the bishops, but the voting was to be secret.

VI. The results were to be submitted to the Holy See by the archbishop or by the senior suffragan.[8]

Guilday, in his *History of the Councils of Baltimore* (page 206), notes that Archbishop Spalding favored giving the priests of the diocese a consultative vote in the selection of candidates for the episcopacy, but the Council of 1866 makes no mention of this. Evidently this consultative voice of the clergy presented a bothersome question. The priests agitated for a vote according to the custom practiced in Ireland, and their complaint was favored by some members of the hierarchy. The problem, however, was to arrive at some expeditious way in which this might be done. The Holy See evidently favored the establishment of the Cathedral Chapter, and proposed in this way to settle the problem of a clerical vote in the nominations. The American clergy, however, were

[8] *Concilii Plenarii Baltimorensis II, Acta et Decreta*, Titulus III, Caput III, nn. 101-107.

never too greatly disposed to the introduction of the Chapter in the States. In regard to the participation of the clergy, however, a certain compromise was arrived at through the Third Plenary Council.

The Third Plenary Council, decr. XV, provided that the diocesan consultors (our counterpart of the Cathedral Chapter) and the irremovable rectors should be gathered together, under the metropolitan or his delegate (or under the senior suffragan in the event the metropolitan see was vacant) to deliberate and to present their vote on three nominees judged worthy and capable of assuming the government of their vacant diocese. Before casting their votes, the consultors and the rectors were required to take an oath of secrecy and swear to the fact that their votes were not determined by any favors or considerations.

The bishops of the province were to convene after the deliberations of the consultors and of the irremovable rectors, and were to discuss and vote upon their recommendations. If the bishops found the names submitted by the diocesan clergy to be unsatisfactory, they were to make their reasons known to the Holy See.

The Third Plenary Council, decr. XVI, also provided that the same rules were to be followed in the selection of candidates for a coadjutorship, but the bishop desiring the coadjutor was to preside over the deliberations of the diocesan clergy instead of the metropolitan. The bishop, moreover, could add his own observations and preferences to those of the diocesan council of clergy when the names were to be presented for the consideration of the other bishops.

The same rules were also to be observed in recommending candidates for a newly formed diocese. In this instance, however, those consultors and rectors were to be convened who were of the territory newly designated as a diocese.[9]

These norms prevailed up until the year 1916, when the Sacred Consistorial Congregation set forth a very detailed set of rules to govern the selection of candidates in the United States. The decree of the Sacred Consistorial Congregation, found in the *AAS*, VIII (1916), 400, may be briefly summarized as follows: a) At the beginning of the Lenten season, starting with the year 1917 and

[9] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii*, Titulus II, Caput I, nn. 15-16.

repeatedly thereafter every two years, the bishop of each diocese is to submit the names of one or two priests whom he considers worthy and fit for the office of bishop. Together with the names of the candidates, who may be from outside the bishop's own diocese, he must submit also pertinent information regarding their age, origin, office, etc. Before submitting these names, however, the bishop is to consult the irremovable pastors and the diocesan consultors, individually and *sub secreto*, that they may recommend those whom they consider likely candidates for the episcopacy. He may also consult with others, again singly and imposing the obligation of secrecy, to obtain the names of candidates or to determine the character and qualities of those already being considered.

The names received from the individual bishops are to be joined to those drawn up by the metropolitan, and the complete list is to be sent to all the suffragans by the Archbishop for their study and consideration.

b) After Easter, at a time and place determined by the Archbishop, the bishops of the province shall meet and discuss those whose names have been presented for their consideration. Following the discussion, the voting takes place. This is done secretly, by the use of colored tokens for indicating an acceptance, a rejection, or an abstention. The votes are tallied in the presence of all, and the results recorded. These are to be submitted to the Holy See, together with any particular recommendations the bishops may feel called upon to make in regard to the particular abilities of the candidates.

The bishops are also free to write directly to the Sacred Consistorial Congregation, on the occasion of the proposing of a candidate or at the time of a vacancy, to express their minds on any particular candidates.

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Decrees and Decisions

CANONICAL

CONGRESSES ON RELIGIOUS LIFE

The Sacred Congregation for Religious, on March 26, 1956, issued a decree setting forth norms for congresses concerned with the renewal of religious life. The Sacred Congregation, in view of the fact that the supreme control of public states of perfection lies with the Holy See, announced that congresses, whether diocesan, regional, or national, as well as courses of lectures and special schools for men and women in religious communities, in which their internal life, their juridical condition and the education and formation to be given them are treated, are not to be held without previous consultation with the Holy See. The promoters and presiding officers of such congresses and courses are to notify the Sacred Congregation, a sufficient time in advance, of the subjects to be treated and of those who will treat of them. After the congress is over the presiding officer will report to the Sacred Congregation the matters treated, the discussions, the conclusions, and in general all matters which touch the renovation of the states of perfection.

Where there already exist federations or councils of Major Superiors with their own statutes and their own commissions, approved by the Holy See, through their assistance men can be chosen and proposed to the Sacred Congregation to speak in such congresses and give such courses. Local Ordinaries who call meetings of the members of religious communities who have houses in their dioceses and there exercise their ministry to discuss with them matters concerning their ministry insofar as it is of importance to the diocese are greatly commended by the Congregation.

* * * * *

CIVIL

ADOPTION AND RIGHT TO INHERIT

The Supreme Court of Illinois, following the minority view, has ruled that a person cannot inherit from an adoptive parent if he has been adopted again by others before the death of the former adoptive parent. While the majority view is in favor of letting a child inherit from successive sets of adoptive parents, the Illinois Court held that such a doctrine would "add confusion to a tranquil field of law." Illinois holds, however, that an adopted child can inherit from his natural parents despite the adoption.

* * * * *

HOSPITAL LIABILITY

The Appellate Division of the New York Supreme Court has ruled that a hospital is not liable for a mistake made by its laboratory technician in determining a patient's blood factor with resulting injuries to the patient. A distinction is drawn in New York legislation between "administrative" activity and "medical" activity. The activity in question was immediately and integrally related to the medical care and treatment prescribed for the patient and was therefore "medical" in the sense of the state's doctrine. Had the activity been "administrative" the hospital might have been held liable.

* * * * *

RIGHT OF PRIVACY

The Ohio Supreme Court, in its first recognition of a cause of action for invasion of privacy, has had occasion to curtail the activities of a collection agency. The right of privacy has been judicially recognized in sixteen other jurisdictions since it was propounded in 1890 by Warren and Brandeis in an article in the Harvard Law Review. Though a creditor can take "reasonable action" to pursue his debtor, even though an invasion of the debtor's privacy ensues, the Court felt that the tactics in the instant case were not acceptable. The collection agency had harassed the debtor with numerous telephone calls every day for three weeks, sometimes even late at night. It had also called the place where the debtor worked and interrupted her work three times within

fifteen minutes. She lost a roomer, was threatened with loss of her job, and finally became ill as a result of the harassment.

* * * * *

LIABILITY OF ELEEMOSYNARY INSTITUTION

The Maryland Court of Appeals has had to deal with a statute which estops insurers of eleemosynary corporations from asserting the immunity of the insured charitable corporation. The statute does not, indeed, create a direct action suit against the insurer. To stop there, however, would render the statute nugatory, for if the charitable corporation is immune, there could never be a judgment against the insured where the defense is raised. The Court, therefore, concludes that the Legislature must have had in mind the fact that the insurer usually conducts the defense of the action. The Court, therefore, holds that the insured is estopped from raising the defense of immunity to the extent of the collectible insurance, and to that extent only.

* * * * *

OUT-OF-STATE ALIMONY DECREE

Joining Connecticut, Kentucky, Minnesota, and South Carolina the Maryland Court of Appeals has held that Maryland equity courts may not only enforce out-of-state alimony decrees but may use the customary equity sanctions in so doing. Maryland has adopted the Uniform Reciprocal Enforcement of Support Act. In a proceeding under this Act the same sanctions would be available as are available in equity, consequently there is no reason why the Maryland equity courts may not use them.

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SEGREGATION AND BOND ISSUES

The Virginia Supreme Court of Appeals has held that the courts cannot interfere to prevent the proceeds of a state bond issue being used for integrated schools. As against the argument that under the Virginia Constitution the only public schools lawful at the time the bonds were approved were segregated schools, the Court notes that the bonds were to be issued to provide funds for school improvements " for white and Negro school children." It was conceded that the proceeds from the bonds were to be used for the children of both races, so the Virginia Court held that it could not

interfere, and that the *School Segregation Case* was beside the point and had no place in the determination of the question.

The North Carolina Supreme Court, faced with a similar question, noted that the *School Segregation Case* merely held that no child may be excluded from attending the school of his choice solely on the basis of race, and that the doctrine was to be put into effect "with deliberate speed." The Court concluded that no one can now foretell where or in what buildings, or to what extent children of the two races will be taught in the North Carolina public schools, and consequently the state bond issue is valid.

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UNION AS EMPLOYER

The Court of Appeals for the District of Columbia has upheld a ruling of the National Labor Relations Board that it need not assert jurisdiction over a dispute between a union and its office employees. The Court found "rational" the conclusions of the NLRB, to wit: that the labor organization was an employer with respect to its employees, that it was a nonprofit organization, and that to it should be applied the standards regularly applied to such organizations, over which it exerts jurisdiction only in exceptional circumstances and in connection with purely commercial activities.

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TRADING STAMPS AND FAIR TRADE

The Massachusetts Federal District Court has held that the use of retail trading stamps is a form of price cutting that, if condoned by a manufacturer, bars him from enforcing the fair trade laws against price cutting. The Court describes trading stamps as a combination cash and trade discount. Accepting the argument that the manufacturer's acquiescence in the retailers' use of trading stamps had resulted from a "reasonable" mistake of law, the Court said it would later issue an injunction if the manufacturer could show that it had taken "appropriate steps" to eliminate the use of the stamps. Admittedly the price reductions effected by the trading stamps is small but under the fair-trade laws a price cut is a price cut, however small.

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LOYALTY PROGRAM CONFINED TO "SENSITIVE" POSITIONS

The United States Supreme Court has invalidated the President's loyalty program as applied to nonsensitive federal employment. The argument for this decision was that the standard prescribed was not in conformity with the Summary Suspension Act of 1950. Congress, in using the term "national security" had in mind only those activities which are directly concerned with the nation's safety from internal subversion or foreign aggression, as distinguished from the general welfare. The intent of Congress the Court finds in its enumeration of the "sensitive" agencies to which it was to apply. The President's authority to extend the Act to other agencies depended upon his finding that they, too, had become sensitive. When he attempted to authorize the summary dismissal of persons holding nonsensitive positions, he exceeded his statutory authority. The dissenting justices noted that one never knows just which job is sensitive, that a janitor may prove to be in as important a spot, security-wise, as the top employee in the building.

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DECEPTIVE INSURANCE ADVERTISING

The Federal Trade Commission has found deceptive an insurance company's advertisements describing the maximum benefits receivable under its accident and health policy but not disclosing the actual schedule of payments. While the advertisements played up statements like "Surgery bills from $5 to $300 for sickness or accident" and "Surgical plan to $300," the policies had schedules listing the amounts payable for specified types of operations, a number of which were limited to payments of $25 or less. Also in the advertisements were such statements as "All inclusive hospital —surgical—nurse protection" and "Maximum protection at moderate cost," so the Commission felt that the advertisements were almost certain to mislead readers into thinking they were getting protection which the policies did not provide.

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BANNING MAGAZINES FROM MAILS

The Court of Appeals for the District of Columbia has held that the Post Office Department could not ban a nudist magazine from the mails because of three procedural weaknesses. The Department had failed to weigh the pictures against the admittedly unobjectionable text. It had failed to investigate or consider the publisher's intention. It did not hold a hearing before the order was issued. The standard laid down in *Walker v. Popenoe* is applied by the court. In that case the Court said one must consider whether the danger that the work will arouse the reader's salacity is such as to outweigh any literary, scientific, or other merit it may have. The Court also said, in the instant case, that the publisher's intent is one of the important elements in obscenity cases. Honest, sincere works must be distinguished from publications pandering to the lewd and lascivious. The need for a hearing was also set forth in the *Walker* case, and the Court said that this applies with equal force to books, magazines and newspapers, all of which are entitled to the protection of the First Amendment. This is especially true of a magazine with a long record of publication and with no charge against it of obscenity of text. The dissenting Judge notes that the magazine is not being barred in advance and may be sent under seal by first class mail. Congress, the dissenter notes, has simply said that obscene matter is not entitled to third-class privileges.

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NEW THEORY OF PAROLE

At their thirty-third annual Meeting the members of the American Law Institute voted tentative approval of an entirely new theory of parole. It would be no longer an exceptional act of grace bestowed upon "good risks" and withheld from the bad, but the invariable incident of any long-term prison sentence. Even an offender who serves his maximum sentence would also have to serve a parole term during which his transition from prison life to full freedom in the community would be supervised.

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SECOND TRIAL ON SAME HOLDUP

The New Jersey Supreme Court has refused to reverse a conviction under an indictment charging robbery of one of four victims of the same holdup. The defendant had, nevertheless, been acquitted previously of robbing the other three victims, who in both trials failed to identify the defendant as its perpetrator. The Court pointed out that four separate crimes were committed, and refused to upset the guilty verdict on the theory of double jeopardy, *res judicata,* collateral estoppel, or due process. The dissenting justices were not convinced that the majority rule was justified even under existing rules of double jeopardy, and it is certainly contrary to the latest tentative draft of the American Law Institute's Model Penal Code.

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SELF-INCRIMINATION WAIVER BY CIVIL DEFENDANT

The U. S. Court of Appeals for the Sixth Circuit has, in what is apparently the first decision specifically in point, applied to a civil litigant the rule that a criminal defendant who voluntarily testifies in his own behalf waives his privilege against self-incrimination. The only restriction upon questions concerning prior convictions are the usual rules on relevancy of the evidence and scope of cross-examination. The Court feels that to deny this extension of the waiver rule would cut off the right of cross-examination, "the most efficacious test devised by the law for the discovery of truth." The decision of the Court is clearly limited, however, to the case where the litigant actually testifies, with nothing said on the effect of merely taking the stand.

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FAILURE TO SHOW FOREIGN LAW

The U. S. Court of Appeals for the Second Circuit has felt obliged to dismiss a suit based on a Saudi Arabia automobile accident because the plaintiff declined to present evidence of Saudi Arabia's tort law. The Court felt that the result was unjust because both parties are Americans and because the plaintiff was a mere transient in Saudi Arabia whereas the defendant was an oil company engaged in extensive business operations there and in a better position, naturally, to know that country's law. The deci-

sions, however, in New York construe narrowly the provisions of that state's Civil Practice Act regarding judicial notice, so the Court could not take judicial notice of the tort law of Saudi Arabia, as it could, e.g. of that of England which, like that of a sister state, is easily comprehensible by an American court.

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MARYLAND'S MOVIE CENSORSHIP LAW

The Baltimore City Court has said that the new statute in Maryland on movie censorship is in accord with the decision in the *Burstyn* case by the United States Supreme Court. In this case the Supreme Court did not decide on the constitutionality of "a clearly drawn statute designed . . . to prevent the showing of obscene films." The Baltimore Court takes this to allow the upholding of "a tightly-drawn censorship statute." The statute forbids motion pictures that teach the use of, or methods of using, narcotics and habit-forming drugs.

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ACCESS TO NEW SUPER-HIGHWAY

The Missouri Supreme Court has refused damages to a landowner who was denied entry to a new limited-access highway constructed across his farm. In assessing total net damages, however, the Court said that separation of the farm into different tracts and the added inconvenience in going about the place may be considered. The Court relied upon California and Oregon cases, cited by the State, to the effect that since the new road was never in existence the landowner could not have had any previous right of access to it, and, since the right of access was restricted at the time it was created, no easement of access ever arose. There was no taking of an easement of access, since no prior right of access existed.

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NO BILLS OF PARTICULARS IN ADMINISTRATIVE PROCEDURE

The Federal Maritime Board has held that the requirement of the Administrative Procedure Act that federal agencies give respondents notice of issues does not require the issuance of bills of particulars. It notes that even in the courts the granting of bills

of particulars is discretionary. Furthermore, the legislative history of the Act shows that Congress understood that the federal agencies are not always in a position to state particularly the matters of fact and law involved.

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ECONOMIC DURESS AND EXPATRIATION

The U. S. Court of Appeals for the Third Circuit has held that economic duress compelling a United States citizen to accept employment from an agency of a foreign government prevents such action from expatriating him. The essence of expatriation under the 1940 Nationality Act is that the expatriating act be completely voluntary, the Court says. The Supreme Court has held that expatriation is to be defined as a voluntary renunciation or abandoning of nationality and allegiance. Numerous cases have held that duress is a defense to expatriation. This seems to be the first appellate court decision on the question.

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UNIONS' LIMITED RIGHT TO INSPECT BOOKS

The United States Supreme Court has held that the National Labor Relations Board may find that an employer has not bargained in good faith where he claims he cannot afford to pay higher wages, but refuses to produce information sustaining his claim. Each case depends upon its own facts and the union is not automatically entitled to look at the books. The majority of the Court notes that the Board's position on the right to look at the books has remained substantially the same since the early days of the Wagner Act. [A commentator might raise the point of a stockholder's right to look at the books under appropriate safeguards.]

Thomas Owen Martin

Book Reviews

DE CAUTIONIBUS SINCERE PRAESTANDIS IN MATRIMONIIS QUIBUS OBSTAT IMPEDIMENTUM MIXTAE RELIGIONIS AUT DISPARITATIS CULTUS. Fr. Bernardinus Beck, O.F.M. Pontificium Athenaeum Antonianum: Facultas Iuris Canonici; Theses ad Lauream, No. 76. Romae, 1956. Pp. xi-117.

Since the promulgation of the Code of Canon Law, a number of commentators have discussed the validity of a dispensation where the required promises (*cautiones*) are insincere. Some of these commentators have maintained that the dispensation is valid even if the promises are insincere while others hold the opinion that under these circumstances the dispensation is invalid. The consequence of the latter opinion is that a subsequent marriage with an impediment of disparity of cult is invalid.

The author of the dissertation under review examines both opinions and holds staunchly that insincere promises vitiate a dispensation.

This dissertation has four chapters. The first two are devoted mainly to an analysis of the arguments set forth by the commentators relative to the opinions mentioned above. The third chapter is a study of the legislation of the Holy See and of the jurisprudence of the Rota. The last chapter is given over to a demonstration of the author's view favoring the invalidity of a dispensation based on *de facto* insincere promises.

The method used by the author is the usual one found in many doctoral dissertations. It is the step by step consideration of arguments pro and con with judgments interspersed. This method, of course, is devastating to an adversary's position. But it also creates a hazard for the author who may be carried away by his own enthusiasm. It is feared that, at times, while not ridiculing an adversary's argument the author is certainly less than kind in his choice of terms. The dozen or more commentators who hold that insincere promises do not invalidate a dispensation are all men of

considerable skill and recognized competence. Their arguments are not worthless. The reviewer agrees with the author of this dissertation that these commentators are in error but a decent respect for their work should at all times be forthcoming.

The bibliography is adequate and it is aided by an index of commentators. A feature of the bibliography is the specific mention of the pertinent documents found in *Fontes C.I.C.* The index of sources is particularly good. This index is divided into a list of the acts of the Roman Pontiffs, the decisions and responses of the Holy Office and of the Congregation for the Propagation of the Faith, the instructions of the Secretariate of State and the decisions of the Roman Rota.

COACCION ECLESIASTICA y SACRO ROMANO IMPERIO. Rosalio Castillo Lara. Pontificium Athenaeum Salesianum: Facultas Juris Canonici. Studia et Textus Historiae Juris Canonici, No. 1. Augustae Taurinorum, It., 1956. Pp. xxi-305.

It is with the utmost pleasure that the first publication of the newly organized series of historical studies in Canon Law can be announced as available to scholars. The home of this new series of historical studies is located at the Salesian Athenaeum in Turin in Italy and it is under the direction of Dr. Alphonse M. Stickler. This is enough to ensure excellent publications and the first volume is clear evidence of the high standards expected of contributors.

The author's volume is primarily a study in Public Ecclesiastical Law. It concerns the power of the Church to inflict penalties. There is no question here of power to impose penalties within the spiritual orbit of the Church. Rather it is an investigation of the Church's power to inflict material penalties to protect itself as a perfect society and to correct recalcitrant members of the Church. Minor material penalties are taken for granted as within the Church's power. Attention is largely drawn and centered on major material penalties such as, for instance, the right to take life (*ius gladii*). The distinction is properly made between the power of the Church to inflict grave penalties and the exercise itself of

this power in the name of churchmen. Hangmen, etc. have long been considered irregular in respect to the sacrament of Holy Orders but this in no wise conflicts with the penal power of the Church.

It is the opinion of some modern commentators that the Church does not possess the right to take life in the exercise of her penal power. The author examines this contention. He demonstrates that some of the sources cited by these commentators have been misread. This misreading is due partially, at least, to the emphasis the documents cited place on the spiritual power of the Church. Emphasis of this kind does not eliminate the power of the Church to inflict material penalties.

Discussion of the penal power of the Church inevitably leads to its comparison to similar power resident in the State. At the precise period in history where this discussion is singularly appropriate, the State is represented by the Holy Roman Empire. It is natural to expect conflicts between these two dominant powers. It is the practical conflict between *sacerdotium* and *imperium*. In these conflicts, the Church had the immense advantage of strong and firm Pontiffs. History knows the valiant efforts of Alexander III, Innocent III, Honorius III, Gregory IX, Innocent IV and Boniface VIII. The author studies carefully the documents of these Pontiffs relative to their position in the face of threats from civil rulers. Fortunately for the development of Public Ecclesiastical Law, the Pontiffs in this period of the Church's history were men of no mean ability and they could with clarity and precision indicate the foundation of the law and the rights of the Church. In the matter of politics, some pontifical decisions may not have been wise, as later events showed, but there was no disposition to surrender the rights of the Church.

The claims of civil rulers were untested and perhaps politically immature.

In his consideration of the penal power of the Church, the author studies her activities against the infidels, the heretics and rebellious Christians. This study is important from the standpoint of penal power entirely independent of any reliance on civil penal power.

In a volume of this kind, footnotes are of significant value. They indicate what should be a consummate effort of the author

to support his text with accurate and abundant citation especially from sources not always accessible to students. A large debt of gratitude is due to the author for his generous provision of apposite footnotes. The author's bibliography is extensive and reasonably complete. But it might have been better arranged if a separate section had been devoted to magazine and encyclopedia articles. The index is satisfactory.

This historical study is an excellent volume to introduce the new Salesian series of investigations dealing with the origins of Canon Law. The field of Public Ecclesiastical Law cannot be too strongly stressed not only for its own importance but also for the solid foundation it supplies for specific canons of the Code of Canon Law. The reviewer wishes the new series every success. It deserves real encouragement and it should have solid financial support.

THE ORIGIN OF POLITICAL AUTHORITY. Gabriel Bowe, O.P., S.T.L., M.A. Academy Library Guild, Fresno, California, 1955. Pp. 102.

The perennial discussion of the origin of political authority is carried on by the author in a series of chapters expounding the theories, among others, of Cajetan, Soto, Bellarmine, Suarez and Billot. This subject has been professedly treated for many years by eminent theologians and jurists and the author does not contribute anything substantially new to the treatment of the problems involved.

After laying a basis for a doctrinal discussion of the origin of political authority, the author devotes considerable time to a review of what have been called the "translation" and the "designation" theories relative to political authority. The position of the noted Jesuit theologian and jurist, Suarez, is subjected to a detailed examination. The two above mentioned theories are compared with the teaching of St. Thomas on the nature of society and authority.

Within the limits which the author sets for himself, there can be little criticism of his efforts. His book can serve as a handy disquisition on the origin of political authority as viewed from the

Catholic standpoint. However, the best thing about the book is the ample citation of works not always accessible to students. Long and apposite citations from the works of theologians and jurists discussed in the text are generously provided.

The bibliography is sufficient for the purpose at hand. Books, magazine articles, encyclopedia articles and monographs are all grouped together. There is no index. The author's book could serve well as collateral reading in courses of Public Law.

PROCESSUS MATRIMONIALIS. Joannes Torre. Editio Tertia Revisa et Aucta. M. d'Auria, Pontificius Editor, Neapoli (Italia), 1956. Pp. xi-755.

There are available several solid commentaries on the Instruction of 1936 of the Sacred Congregation of the Sacraments relative to the procedure in juridical cases involving the sacrament of marriage. The author's commentary is perhaps not the best known in the United States but it has received enough attention to demand a third edition. This edition has been revised according to the latest decisions of the Roman Rota. The result is a thoroughly dependable book up to date in every way and wholly suitable for study and reference.

Since the commentaries on the above mentioned Instruction must needs run mostly along the same way, it will be of more interest to point out the discussive consideration the author contributes to the juridical obligation of this Instruction. What the author says about this Instruction can within reason be applied to other Instructions emanating from the Roman Dicasteries. The main point at issue is the obligatory force of an Instruction where it actually varies from the prescriptions of the Code of Canon Law. The author cites commentators on both sides of the question. Some have claimed that an Instruction subsequent to the promulgation of the Code will derogate from the Code where it states a prescription different from the Code. This is based on the Papal approval accorded an Instruction. Others maintain that unless a specific derogation is approved by the Pope, the Code is to be followed not the Instruction. It is entirely within reason that official documents should clearly indicate their obligatory force.

The author produces several arguments to sustain a contention that in a matter of conflict, even though minor, the Code is to be upheld not a subsequent Instruction. The principal argument is that the rule of the Motu Proprio of Pope Benedict XV, *Cum iuris canonici,* must be observed. This Papal document demands that a revision of the prescriptions of the Code be presented to the Committee for the Authentic Interpretation of the Code of Canon Law to be processed before it can be considered a change in the law. In the Instruction discussed here, there is no clear evidence that this was done.

The author includes many useful appendices in his book. A complete file of documents provided by the author can serve as a model for a case involving the nullity of marriage. The Index is entirely satisfactory. The bibliography, however, is not compiled with the care it demands. If the author intends the bibliography to be an aid to further study, the list he provides needs much more attention.

SYNODUS DIOECESANA CAMDENSIS PRIMA, Preside Exc. mo ac Rev. mo D. No. Bartholomaeo Joseph Eustace, S.T.D., Episcopo Camdensi, 1955. Pp. iv-345.

After considerable preparation the Most Reverend Ordinary of Camden, New Jersey celebrated his first Synod in May, 1955. The results of this preparation are apparent throughout the more than four hundred statutes. The principal items of discipline are adequately considered, and in keeping with the more recent emphasis on the Liturgy specific statutes deal with this matter.

In some places there is at times friction between clerics and some officials of the diocese. This is due mostly to the indistinct ambit of the authority of these officials. The Synod of Camden properly indicates, for instance, the authority of the Superintendent of Schools and of the Director of Cemeteries. Statutes such as these should be found in all Synods.

Among other items worthy of mention is the clear delineation of the various deaneries.

None the less there are two statutes in this Synod of debatable validity. In civil law, everyone usually has the right to choose

freely the executor of his will. This right should not be infringed by a statute which demands that a priest be the executor of a priest's will. In canon law, no cleric should, without the permission of his Ordinary, assume an obligation where he must make a report to the civil court. It is not easy to reconcile this law with the statute in question. The implication of the law of the Code is that circumstances may demand in individual cases that a priest be used as an executor. But the occasional difficulties which occur in the probate of a priest's will scarcely demand a statute which indiscriminately imposes an obligation on all priests.

The other statute of debatable validity concerns the distribution of fees connected with funerals and weddings. The Ordinary can without question determine the fees on these occasions. Yet it should be remembered that the fees are perquisites of the pastor. They are not a source of revenue for the parish church. In all cases, the major portion of the fees (not the stipend for the mass), is the pastor's. Legitimate expenses for illumination, music, etc. can, of course, be deducted but the right of the pastor to the fees themselves is paramount.

With the statutes of the Synod of Camden are printed, in the vernacular, several documents for handy reference. Among these is the latest Encyclical of Pope Pius XII on sacred music. A long instruction on episcopal visitation is also provided. Despite some imperfections, the Synod of Camden is one of the better Synods celebrated within recent years. It can be recommended to Ordinaries, here and abroad, who contemplate a Synod of their own.

FIRST SYNOD OF THE DIOCESE OF MADISON Celebrated by His Excellency the Most Reverend William P. O'Connor, D.D., Bishop of Madison. Madison, Wisconsin, 1956. Pp. 158.

According to canon 356, § 1 of the Code of Canon Law, legislation in the diocesan Synod should be restricted to particular matters necessary or useful to the diocese. By this standard nothing of universal discipline, whether of clergy or laity, or sacraments or institutes, is properly within the scope of the diocesan Synod. Mere verbal repetition and obvious paraphrase of the obligations set down in the Code of Canon Law are not suitable matter for diocesan statutes. It should be taken for granted that rights con-

ceded in the Code and obligations imposed by the Code are known and need no restatement in a Synod. In the same sense, in the United States, the existing valid laws of the Councils of Baltimore and of the pertinent provincial Councils should not be repeated in diocesan Synods. The only matter proper to a Synod is found in the prescript of canon 356, § 1 of the Code of Canon Law. There are in this canon deliberate and precise restrictions which arise from the very nature of the diocesan Synod.

The Synod of Madison, like many other Synods, here and abroad, contains entirely too many statutes which are at best restatements of the Code of Canon Law and of particular Councils, national and provincial.

There are, however, in this Synod some points to which attention should be drawn. Perhaps, chief among these is the prohibition to take part in or to attend a marriage which is obviously invalid. This prohibition includes invalid marriages of non-Catholics as well as Catholics. It is highly of value to have the proper position of Catholics stated in forceful language which will admit of no compromise. But the Ordinary of the Diocese of Madison has gone even further. He forbids Catholics to attend " showers " and receptions in connection with such invalid marriages. Social contacts may make obedience to this law difficult at times but it is desirable that a clear-cut law emphasizing religious convictions be at hand to guide the faithful in their social relationships.

There are several Appendices. One of these can serve as a model for the incorporation and internal government of parish corporations. For some reason, not apparent to the reviewer, the articles (numbering over sixty) relative to parish corporations are continued as a part of the progressive series of statutes. Among these articles there are items necessary for incorporation, items relative to trustees, officers, board of directors, duties of the president, vice-president and of the pastor as fiscal agent. The articles conclude with instructions on how to proceed with amendments to by-laws. This is perhaps the most detailed description of the operation of parish corporations to be found in the several States where civil law permits such corporations.

A special word should be said in regard to the index to the statutes of this Synod. Much care and thoughtful labor have entered into the construction of the index. It is in every sense detailed and will be of the utmost service.

EDWARD ROELKER

Chronicle

GENERAL

Easter messages from eight of the American hierarchy were broadcast to those behind the Iron and Bamboo Curtains. The members of the hierarchy were: Cardinals Stritch, Spellman, and McIntyre; Archbishops Keough, Lucey, and Cushing; and Bishops McGuinness and Sheen.

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Archbishop Howard of Portland, Oregon, celebrated his golden jubilee as a priest and the thirtieth anniversary of his consecration as a bishop.

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Archbishop Vehr of Denver, Col., celebrated the silver jubilee of his consecration as a bishop.

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Monsignor Tanner, Assistant General Secretary of the NCWC, celebrated his silver jubilee as a priest.

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The Most Reverend Eberhard, O.S.A., Prior General of the Augustinian Order, arrived in the United States for a visitation of the houses of his community.

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Bishop Edward Kelly of Boise, Idaho, died of a heart attack on April 21.

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Bishop Brennan, former Ordinary of Richmond, died on May 23.

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Cardinal Spellman was host to the tenth annual Theological Convention held in New York in June.

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The Most Rev. Herbert Kramer, C.PP.S., Superior General of the Congregation of the Precious Blood, arrived in the United States for a visitation of the American houses of his institute.

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The Very Rev. Ernest Giovannini, Provincial Superior of the Eastern Province of the Salesian Fathers, celebrated his silver jubilee as a priest.

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DIGNITIES

The Very Rev. Thomas Plassman, O.F.M., celebrated the golden jubilee of his ordination on April 4. He was the recipient of the papal cross *Pro Ecclesia et Pontifice.*

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The Rev. Adolph Hrdlicka, O.S.B., has been appointed President of St. Procopius College, Lisle, Illinois.

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An honorary Doctor of Laws degree was conferred on Bishop McShea, Auxiliary Bishop of Philadelphia, by St. Joseph's College, Philadelphia.

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The Most Reverend Maurice Schexnayder has been named by Pope Pius XII to succeed Bishop Jules Jeanmard as Ordinary of Lafayette, Louisiana. Bishop Jeanmard retired because of age and ill health. Installation of Bishop Schexnayder has been scheduled for May 24.

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Bishop-Elect Schott will be consecrated Auxiliary Bishop to Bishop Leech of Harrisburg on May 1.

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Bishop-Elect Bell of Los Angeles has been named Auxiliary to Cardinal McIntyre of Los Angeles. The date for consecration of Bishop-Elect Bell is June 4.

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Bishop Hermaniuk, C.SS.R., has been named Apostolic Administrator of the Byzantine Rite Exarchate of Winnipeg, Canada.

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The Right Rev. John J. Carberry, Officialis of the Brooklyn Curia and President of the National Canon Law Society of America, has been named Coadjutor with the right of succession to the diocese of Lafayette, Indiana.

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Cardinal Agagianian has been named by the Holy Father President of a Pontifical Commission for the code of canon law for the Eastern Rites.

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The Rev. Edward Dowd has been named Assistant to the Vice Rector of The Catholic University of America. The Rev. Gerard Sloyan has been named Assistant to the Dean of the College of Arts and Sciences at the University. Announcement of the creation of these two new offices came from the Rector, the Most Rev. Brian J. McEntegart.

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The Rev. Walter A. Coggin, O.S.B., has been elected Abbot Coadjutor of Belmont Abbey.

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Cardinal Stritch has been named Cardinal Protector of the Dominican Sisters of St. Catherine of Siena at Kenosha, Wisconsin.

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Bishop-Elect Ackerman, C.S.Sp., has been named Auxiliary Bishop to Bishop Buddy of San Diego.

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Bishop-Elect Thomas Gill has been named Auxiliary Bishop to Bishop Connolly of Seattle.

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Three priests of the diocese of Norwich, Conn., have been elevated by Pope Pius XII to the rank of Domestic Prelates. They are: Brigadier General Finnegan of the United States Air Force; Lieutenant Colonel Murphy of the United States Army; and the Reverend Cote of Mossup, Conn.

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The Very Rev. Ignatius Smith, O.P., Dean of the School of Philosophy at The Catholic University of America, received the papal medal *Pro Ecclesia et Pontifice* and the Cardinal Gibbons medal of The Catholic University Alumni Association on the occasion of a dinner commemorating his fifty years of service to the University.

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Six priests of the Archdiocese of Boston have been made Domestic Prelates by the Holy Father and one priest of the same Archdiocese has been named a Protonotary Apostolic. The six priests named Domestic Prelates are: Monsignors Riley, Powers, Griffin, Hagan, Connolly, and O'Connell. Monsignor Dalton was elevated to the rank of Protonotary Apostolic.

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The Rev. Edward Schlotterback, O.S.F.S., regional Superior of the Oblates of St. Francis de Sales in South Africa, has been named Vicar Apostolic of Keetmanschoop, Southwest Africa.

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The Very Rev. Paul Reinert, S.J., President of St. Louis University, was elected President of the North Central Association of Colleges and Secondary Schools.

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The Rev. Vincent McCormick, S.J., American Assistant to the General of the Society of Jesus, has been named a Consultor to the Sacred Congregation for the Propagation of the Faith.

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The Most Rev. Amleto Cicognani, Apostolic Delegate to the United States, was the recipient of an honorary degree, the Doctorate of Laws, on May 10 from Niagara University.

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The Rev. Ralph Collins of Davenport, Iowa, has been installed as President of St. Ambrose College.

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The Right Rev. David Dooling of Utica and the Right Rev. Edward Buttimer of Rome, N. Y., have been elevated to the rank of Protonotary Apostolic.

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The Rev. Edgar Schmiedeler, O.S.B., George Meany, John W. McCormack, Dr. Hugh Stott Taylor, Thomas W. Pangborn, and Neil MacNeil were recipients of honorary degrees at the commencement exercises of The Catholic University of America in June.

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The Most Rev. Michael Browne, O.P., Master General of the Order of Preachers, received an honorary doctorate of laws degree from the University of Ottawa.

ROMAEUS W. O'BRIEN, O.Carm.

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